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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1985

MILDRED V. DRAKE

v.

RAYMARK INDUSTRIES, INC.,

Petitioner

v.

BATH IRON WORKS CORPORATION,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Counsel for Petitioner:
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QUESTIONS PRESENTED

I. Did the lower court err in holding that claims against vessel owners by shipbuilders and shiprepairmen covered by the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, for injuries sustained on navigable waters because of vessel owner negligence are not within the admiralty jurisdiction of the federal courts but are instead governed by state law?

II. Did the lower court err in holding that section 5(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), directly bars third-party claims for contribution and tort indemnity despite this Court's holding in *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190 (1983)?

III. Is the employer of a harbor worker who elects to receive workers' compensation benefits solely under the Longshore and Harbor Workers' Compensation Act entitled to the benefit of the exclusive liability provisions of state workers' compensation acts?*

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* The listing of the parties appears on page 3, infra.

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PARTIES

The following are the parties for whom appearances were filed with the United States Court of Appeals for the First Circuit in the matter of Mildred V. Drake v. Raymark Industries, Inc., et al. v. Bath Iron Works Corporation, Docket Nos. 84-2033 and 84-2034 (Consolidated):

Raymark Industries, Inc.[1]

Owens-Illinois, Inc.

Celotex Corporation

Pittsburgh Corning Corporation

H. K. Porter Company, Inc.

Southern Textile Corporation, Inc.

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[1]The parent corporation of Raymark Industries, Inc. is Raymark Corporation, Trumbull, Connecticut. Raymark Industries' only subsidiary, a corporation which it does not wholly own, is Daikin-R-M Co., Ltd., 1053-2 Kamiosatsu, Chitose City, Hokkaido, Japan.

Keene Building Products Corporation

Owens-Corning Fiberglas Corporation

Bath Iron Works Corporation

OPINIONS BELOW

The Opinion of the Court of Appeals is reported at 772 F.2d 1007 and is reprinted as Appendix A. (App. A, 1a - 67a.) The District Court's Memorandum and Order from which appeal was taken is not reported, but is reprinted as Appendix B. (App. B, 68a - 73a.).

JURISDICTION

The Judgment of the Court of Appeals was entered on August 27, 1985. A petition for rehearing and rehearing en banc was denied on October 22, 1985 (App. C, 74a-75a.).

The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are United States Constitution, Article III, section 2; 5 U.S.C. § 8116(c) (1980); 33 U.S.C. § 902(3) & (21) (1978) (current version at 33 U.S.C. § 902 (1978 & Supp. 1975)); 33 U.S.C. § 905 (1978) (current version at 33 U.S.C. § 905 (1978 & Supp. 1985)); 46 U.S.C. § 740 (1978); and Me. Rev. Stat. Ann., Tit. 39, § 4 (1978). Those constitutional and statutory provisions are reprinted in Appendix E.

STATEMENT OF THE CASE

A. Facts

This case is one of some 300 cases pending in the District of Maine wherein present or former shipyard workers seek from the manufacturers of asbestos-containing insulation products damages

for lung diseases and various forms of cancer allegedly developed by them as a result of exposure to asbestos dust on board vessels in navigable waters being built or repaired at the shipyards. The now-deceased plaintiff, Forrest Drake, worked as a pipecoverer at the Bath Iron Works (BIW) in Bath, Maine, intermittently from 1942 to 1980. His job was to cover the pipes, boilers, machinery, and ductwork of vessels under construction in navigable waters with asbestos insulation, fiberglass, cork, and other products, depending on the type of ship's system involved. He also was employed to remove insulation and then replace it on vessels that were at the yard for repairs. According to the allegations of the Plaintiff's Complaint, the installation of insulation generated respirable dust because the products had to be cut or shaped to fit the ship's system

involved and because the work often was confined to tight, unventilated ship's spaces. The removal or "ripout" of insulation during repair work allegedly generated greater quantities of dust because the insulation had deteriorated or become damaged in use, and because the insulation was destroyed by cutting, pounding, or scraping during the removal itself.

In the early 1970's, Forrest Drake developed asbestosis, a type of pneumoconiosis, or dust disease of the lungs, allegedly from the prolonged inhalation of asbestos dust. Approximately ten years later he developed lung cancer and died. He applied for and received Longshore and Harbor Workers' Compensation Act (LHWCA) benefits from his employer, BIW. His widow now receives these benefits. Neither Mr. Drake nor his widow ever applied for or

received benefits under the Maine Workers' Compensation Act (MWCA), 39 M.R.S.A. §1 et seq.

Mr. Drake, and later his widow, brought claims against Raymark Industries, Inc. (Raymark) and the other manufacturers of the asbestos products used at BIW. Raymark, in turn, brought a third-party action against BIW for contribution and/or tort indemnity. The gist of this third-party action is that BIW is liable due to its willful negligence for all or part of the damages sustained by the Drakes. The third-party action alleges negligence on the part of BIW both in its capacity as the owner and operator of the shipyard at which Forrest Drake worked and in its capacity as the owner pro hac vice of the vessels at the yard on which Mr. Drake's exposure to

asbestos dust occurred.[2]

According to the allegations of the third-party complaint, the negligence of BIW as owner/operator of the shipyard consists of, inter alia, breaches of the duties to provide a safe place to work, to warn of latent dangers or health hazards in the workplace, and to provide safe equipment or materials for the work itself. All of these duties are well

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[2]As explained infra Raymark contends that the duty of care owed by BIW as owner pro hac vice of the vessels on which Forrest Drake worked is governed by section 905(b) of the LHWCA, which authorizes a covered employee such as Drake, see n. 4 infra, to bring an action for "the negligence of a vessel." Section 902(21) of the LHWCA, 33 U.S.C. § 902(21), which is set forth in full in Appendix E (App. E, 85a), defines the term "vessel" to include a vessel's owner or owner pro hac vice. Accordingly, BIW, in its capacity as vessel owner pro hac vice, will be referred to hereafter simply as "the vessel" or "the vessel owner."

recognized in Maine law. See Hurd v. Hurd, 423 A.2d 960 (Me. 1981).

It is alleged that, as vessel owner, BIW may be held liable in negligence for failing to warn Forrest Drake and his co-workers of the latent dangers posed by the extremely dusty conditions on the vessels and, particularly, of the latent dangers posed by the "rip-out" of the asbestos insulation covering the pipes, boilers, machinery and ductwork of the vessels at the yard for repairs. The shipowner's duty to warn of hidden dangers which will be encountered by those legitimately on board the vessel is well recognized in maritime law and the decisions of this Court. Scindia Steam Navigation Co., Ltd. v. De Los Santos, 451 U.S. 156 (1981).

Raymark would prove its allegations of negligence against BIW as owner/ operator of the yard and as vessel owner

by establishing that BIW was fully aware of the dangers allegedly posed by high concentrations of asbestos dust on board its vessels at least as early as World War II and that it failed over the next three decades either to warn of this hazard or to provide proper ventilation or respiratory equipment which would eliminate the dangers. Although BIW has raised numerous factual and legal defenses to this third-party action, only one, strictly legal defense is involved given the present posture of this case; namely, the nature and scope of BIW's immunity from tort liability under 33 U.S.C. § 905 or 39 M.R.S.A. § 4 as the employer of Forrest Drake.

B. Jurisdiction of Court of Original Jurisdiction

Raymark's Third-Party Complaint against BIW was filed in the District Court pursuant to that court's diversity,

28 U.S.C. § 1332, admiralty, 28 U.S.C. § 1333 and pendent jurisdiction. Raymark Industries, Inc. is incorporated under the laws of the State of Connecticut and has its principal place of business in Trumbull, Connecticut. BIW is incorporated under the laws of the State of Maine and has its principal place of business in Bath, Maine. The facts set forth above and the discussion below demonstrate that the claim against BIW as vessel owner is a maritime claim, cognizable in admiralty.

C. Decision Below

The Court of Appeals held that the state law claims against BIW as owner/operator of the shipyard were directly barred by the immunity from tort liability to an employee found in section 905(a). (App. A, 59a, 66a; 772 F.2d at 1021-22.) The term "directly" is the key to understanding the importance of the

First Circuit's holding. In many jurisdictions the employer's immunity from a third-party claim for contribution or indemnity does not spring directly from the applicable immunity provision but rather indirectly from the law of contribution and indemnity itself. Many states require joint liability to the plaintiff as an element of a claim of contribution or tort indemnity against the third-party defendant. Thus, in these states, since the employee cannot sue his employer in tort neither can any defendant because the absence of joint liability to the plaintiff/employee defeats all contribution or tort indemnity claims. 2A A. Larson, The Law of Workmen's Compensation § 76, at 14-561 (1983). Maine, however, does not require joint liability to a plaintiff as an element of a contribution/indemnity claim. Otis Elevator Co. v. F. W.

Cunningham, 454 A.2d 335, 337 (Me. 1983); Bedell v. Reagan, 159 Me. 292, 298, 192 A.2d 24, 27 (1963). Thus, to defeat Raymark's state-law claims against BIW, the First Circuit had to, and did, find a direct bar against such claims in section 905(a). (App. A, 59a, 66a; 772 F.2d at 1021-22.) The Court also suggested that despite Drake's election and receipt of workers' compensation benefits under the LHWCA only, the state law actions were directly barred by section 4 of the MWCA. The court, however, did not reach the question whether section 4 of the MWCA could apply if section 905(a) did not itself bar the owner/operator claims. (App. A, 66a; 772 F.2d at 1022.)

Raymark's claims against BIW as vessel owner are based on section 905(b) of the LHWCA. Even before the enactment of section 905(b) in 1972, the employer, as vessel owner, was liable in tort for

injuries sustained by an employee on the vessel. Jackson v. Lykes Steamship Co., 386 U.S. 731 (1967); Reed v. The Yaka, 373 U.S. 410 (1963). Section 905(b) preserved this traditional exception to employer immunity, but limited all vessel owners' liability for injuries to covered employees to actions based on negligence. Jones & Laughlin v. Pfeiffer, 462 U.S. 523 (1983).[3] Since section 905(b)

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[3]Section 905(b) was amended in 1984 to eliminate shipyard workers' claims against vessels that are owned by their employer. Pub. L. 98-426 § 5(a)(1). Since the amendment applies only to injuries after September 27, 1984, Pub. L. 98-426 § 28(c), it does not affect Raymark's claim in this case or the innumerable analogous claims of asbestos manufacturers pending against shipyards around the country. Moreover, because the First Circuit held that section 905(b) applies only with respect to certain of the maritime workers who are covered by the LHWCA, the decision will continue to affect the rights of the vast majority of LHWCA-covered employees who work on vessels not owned by their employer.

constitutes a well-recognized exception to the employer's immunity, the First Circuit acknowledged that BIW could be liable as vessel owner if section 905(b) applied.

The Court held that section 905(b) applied only to maritime torts, that is, to torts cognizable under the admiralty jurisdiction of the federal courts. The Court applied the test for admiralty jurisdiction enunciated by this Court in Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. 249 (1972). Since it was undisputed that the situs of Forrest Drake's exposure to asbestos and resulting injuries was the navigable waters of the United States, the question in the eyes of the First Circuit became whether a claim by Forrest Drake against the vessels on which he worked would bear so significant a relationship to traditional maritime activities as to

satisfy the "nexus" half of the Executive Jet formulation. Apparently relying on the job duties of Forrest Drake, the Court held that the nexus requirement was not satisfied, and, therefore, that the remedy provided by section 905(b) would be unavailable to Forrest Drake and unavailable to Raymark as a third-party plaintiff. In a decision issued three weeks later, in what the First Circuit described as a companion case, the panel explained that maritime law had no application to claims by most ship-builders or ship repairmen against the vessels they worked on, and, therefore, that Maine law would govern the duties and liabilities of the vessel owner to this class of workmen. In Re All Maine Asbestos Litigation (PNS Cases), 772 F.2d 1023, 1031 (1st Cir. 1985). See also In Re All Maine Asbestos Litigation (PNS Cases), No. 84-1779, Order of Court

Denying Petition for Rehearing (1st Cir. October 22, 1985) (stating that the duty owed by the vessel to Drake is "better ... left to state tort law") (reprinted at App. D, 82a).

REASONS FOR GRANTING THE WRIT

I. A Decision From This Court Is Needed To Resolve A Conflict In The Circuits On The Question Whether Relief Under Section 905(b) Of The LHWCA Is Available To All Covered Employees Or Only To Those Covered Employees Who Qualify As So-Called Sieracki Seamen.

The Court of Appeals correctly decided that whether Raymark has a viable maritime claim depends on whether Forrest Drake "could have brought a section 905(b) action against BIW for his injuries." (App. A, 29a; 772 F.2d at 1014). The Court's invocation and application of the Executive Jet nexus test to determine Drake's rights, however, generates a conflict among the

circuits and raises serious and troublesome questions about the availability of the section 905(b) remedy and the scope of the admiralty jurisdiction of the federal courts. Section 905(b) provides that "in the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person ... may bring an action against such vessel ...." Although the parties agreed that Drake -- a shipbuilder and shiprepairman -- is a covered employee,[4] the court concluded

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[4]Prior to its amendment in 1984, Section 902(3) defined "employee" as follows:

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to

that section 905(b) applies only if the Executive Jet test for admiralty jurisdiction is satisfied. In applying Executive Jet's nexus requirement, the court relied solely on cases, including its own decision in Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir.), cert. dismissed, 463 U.S. 1247 (1983), that hold that shipyard workers' claims against asbestos manufacturers are not maritime. The First Circuit explained, however, that the type of physical injury sustained by Mr. Drake was not a relevant consideration (App. A, 37a n. 8; 772 F.2d at 1016 n. 8), and focused exclusively on

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(footnote continued)
load or unload or repair any small vessel under eighteen tons net.

Although the 1984 amendments added additional exceptions, workers, like Drake, who build and repair large vessels, retain their status as covered employees. See Pub. L. 98-422 § 2(a), codified at 33 U.S.C. § 902(3) (Supp. 1985).

the nature of Drake's work, explaining that in Austin

> [w]e concluded that the plaintiff was entitled to invoke admiralty only if the decedent was 'injured while doing work traditionally done by the members of the crew and thus, presumably, subject to many of the same hazards as seamen'.... We ruled that because the decedent had been engaged in work 'requiring special equipment and skills' not commonly found among the members of the ship's crew, admiralty law was not applicable to the plaintiff's claims.

(App. A., 33a - 34a; 772 F.2d at 1015, quoting Austin v. Unarco Industries, Inc., 705 F.2d at 12-13.)

This language, of course, derives from this Court's decision in Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946).[5] The plain import of the

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[5]Sieracki involved a personal injury suit by a longshoreman against the vessel he was hired to unload. The question before the Court, of course, was not whether the action was cognizable in admiralty, but, rather whether the vessel's warranty "of seaworthiness, traditionally owed by an owner of a ship to seamen, extends to a stevedore

First Circuit's decision is that the section 905(b) remedy against the vessel owner is available only to those shipyard workers who do work formerly done by the ship's crew itself, a class which in maritime parlance has come to be called "Sieracki-seamen". See Gilmore and Black, The Law of Admiralty, 440-41 (2d ed. 1975).

As the First Circuit acknowledged, its decision brings it into sharp conflict with the Fifth Circuit's decision in Hall v. Hvide Hull No. 3, 746 F.2d 294 (5th Cir. 1984), reh'g. denied, 753 F.2d 1075 (5th Cir. 1985). The Hall

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(footnote continued)
(longshoreman) injured while working aboard the ship," Seas Shipping Co. v. Sieracki, 328 U.S. 85, 87 (1946), thereby rendering the vessel owner strictly liable to that workman. The Court concluded that Sieracki was entitled to the remedy because a longshoreman performs "a seaman's work and incur(s) a seaman's hazards." Id. at 99.

panel addressed the question whether a LHWCA-covered ship construction worker injured by the negligence of a floating hull had a section 905(b) claim that was cognizable in admiralty. Relying on this Court's decision in Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates, 459 U.S. 297, 320 n. 29 (1983), as to the broad scope of admiralty jurisdiction under the LHWCA, the Hall panel held that Executive Jet could not be applied to defeat federal admiralty jurisdiction over a covered employee's negligence claim against a vessel, including vessels under construction on navigable waters. Hall v. Hvide Hull No. 3, 746 F.2d at 303.

The First Circuit Court also noted that its ruling conflicts with two other decisions, Lundy v. Litton Systems, Inc., 624 F.2d 590 (5th Cir. 1980), cert.

denied, 450 U.S. 913 (1981); and McCarthy v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983), cases that, in the eyes of the First Circuit, overlooked the Executive Jet nexus requirement in determining whether the section 905(b) remedy is available. Though not specifically referred to by the First Circuit, several other decisions also apply section 905(b) to harbor workers who use specialized skills and equipment not typically thought of as maritime.[6] These decisions implicitly confirm the holding

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[6]Other cases in which section 905(b) has been applied to LHWCA-covered employees who apparently would not satisfy the First Circuit's "nexus" test include the following:

Fourth Circuit: Allied Towing Corp. v. Tatem, 580 F.2d 702 (1978) (applying section 905(b) to ship repair workers' claims of vessel owner negligence against their employer/vessel owner);

Fifth Circuit: Hill v. Texaco, Inc., 674 F.2d 447 (1982) (applying section 905(b)

denied, 450 U.S. 913 (1981); and McCarthy v. The Bark Peking, 716 F.2d 130 (2d Cir. 1983), cases that, in the eyes of the First Circuit, overlooked the Executive Jet nexus requirement in determining whether the section 905(b) remedy is available. Though not specifically referred to by the First Circuit, several other decisions also apply section 905(b) to harbor workers who use specialized skills and equipment not typically thought of as maritime.[6] These decisions implicitly confirm the holding

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Fifth Circuit: Hill v. Texaco, Inc., 674 F.2d 447 (1982) (applying section 905(b)

in Hall that any injury to an LHWCA-covered employee caused on navigable waters by the negligence of the vessel on

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(footnote continued)
to negligence claim against vessel brought by LHWCA-covered employee using ultrasonic testing equipment to determine effect of rust on an oil tanker's walls); Stass v. American Commercial Lines, Inc., 720 F.2d 879 (1983) (applying section 905(b) to claim by shipfitter); Duplantis v. Zigler Shipyards, Inc., 692 F.2d 372 (1982) (applying section 905(b) and apparently admiralty jurisdiction to claims by shipyard employees injured by explosion during major repairs of tank barge).

District Courts: Savoy v. United States, 469 F. Supp. 301 (E. D. La. 1978) (applying section 905(b) to claim of shipyard employee engaged in overhaul of decommissioned naval vessel); Kalogeros v. Brasileiro, 446 F. Supp. 175 (S.D.N.Y. 1978) (applying section 905(b) to claim of vessel owner negligence brought by machine works employee hired to repair vessel's engine room); Harrelson v. United States, 420 F. Supp. 788 (S.D. Ga. 1976), affirmed, 548 F.2d 353 (5th Cir. 1977) (applying section 905(b) to machinist's claim of vessel owner negligence arising during overhaul of naval tanker); DiLorenzo v. Robert E. Lee, Inc., 412 F. Supp. 1012 (E. D. La. 1976) (applying section 905(b) to ship construction worker's claim of vessel owner negligence).

which he was working necessarily satisfies the requirements for admiralty jurisdiction.

The Hall decision effects the intent of Congress. The Congress that enacted section 905(b) intended it to promote the safety of all LHWCA-covered employees who work on board ships[7] and to ensure their negligence remedy against the vessel.[8] Congress also intended to hold all vessel owners to a single,

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[7]The Report of the House Committee on Education and Labor accompanying the 1972 amendments to the LHWCA states that the standard of care owed under section 905(b) "would be . . . fully consistent with the objective of protecting the health and safety of employees who work on board vessels." H. R. Report No. 94-1441, 92d Cong., 2d Sess. (1972), reprinted in 1972 U. S. Code, Cong. & Admin. News 4698, 4703 (emphasis added).

[8]The House Report explains,

> The Committee rejected the proposal, originally advanced by the industry, that vessels should be treated as

uniform standard of care applicable throughout the nation.[9] Absent

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(footnote continued)

joint employers of longshoremen or other persons covered under this Act working on board such vessels. This would result in restricting the vessel's liability in all cases to the compensation and other benefits payable under the Act. The Committee believes that where a longshoreman or other worker covered under this Act is injured through the fault of the vessel, the vessel should be liable for damages as a third party, just as land-based third parties in non-maritime pursuits are liable for damages when, through their fault, a worker is injured.

Id. (Emphasis added.)

[9]The House Report states,

> The Committee does not intend that the negligence remedy authorized in the bill shall be applied differently in different ports depending on the law of the state in which the port may be located. The Committee intends that legal questions which may arise in actions brought under these provisions shall be determined as a matter of federal law.

Id., 1972 U. S. Code, Cong. & Admin. News at 4705; see also Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156, 166 n. 13 (1981).

admiralty jurisdiction over all claims by covered employees against the vessels on which they work, uniform treatment becomes impossible.

A decision by this Court resolving the conflict among the Circuits on the applicability of section 905(b) is critical. Since under modern ship-building and ship repair practices most workmen must possess specialized skills and use specialized equipment, the First Circuit's decision eliminates the section 905(b) remedy for a majority of the shipyard workers Congress intended to protect. Additionally, vessel owners contracting with the shipyard facilities in this country are entitled to the uniformity of treatment which only a decision by this Court can provide.

II. The Court of Appeals' Interpretation And Application of the Executive Jet "Nexus" Requirement Conflicts with the Decisions of this Court.

The Court of Appeals' decision represents a startling retreat from the traditional notion of a maritime tort and, therefore, a dangerous contraction of the federal courts' admiralty jurisdiction. This Court's analysis in Executive Jet was expressly intended to apply in situations where the occurrence of the injury on navigable waters was "wholly fortuitous" in relation to the wrong which gave rise to the injury sustained. Executive Jet Aviation, Inc. v. City of Cleveland, 409 U.S. at 266. In Foremost Insurance Co. v. Richardson, 457 U.S. 668 (1982), this Court again emphasized the importance of focusing on the nature of the wrong or tortious conduct which gave rise to the claim. Id. at 674. In both cases this Court

stressed the need for national uniformity in laws affecting maritime commerce.

Since the wrong here alleged is the vessel's negligent failure to warn of a latent danger on the vessel itself and the failure to protect maritime workers against that danger, the occurrence of the injury on board ships in navigable waters is in no way fortuitous in relation to the tortious conduct alleged. Where the tortfeasor is a vessel in navigable water and the alleged wrong relates to the vessel's condition, the tort is intrinsically maritime in the most traditional sense of the term. Vessels are the very stuff of all maritime concerns, and few legal truisms have been more consistently stressed by this Court than the proposition that vessel owner negligence gives rise to a maritime tort. See, e.g., Foremost Insurance Co. v. Richardson, supra; West

v. United States, 361 U.S. 156 (1961); and Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625 (1959).

It is apparent here that the First Circuit's reliance on those cases, including one of its own, which hold that the worker's claim against Raymark or other manufacturers is not maritime, is misplaced. (App. A, 33a - 34a; 772 F.2d at 1015-16.) See Harville v. Johns-Manville Products Corp., 731 F.2d 775 (11th Cir. 1984); Lowe v. Ingalls Shipbuilding, 723 F.2d 1173 (5th Cir. 1984); Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir. 1983), cert. dismissed, 463 U.S. 1247 (1983); Keene Corp. v. United States, 700 F.2d 836 (2d Cir. 1983), cert. denied, ___ U.S. ____, 104 S. Ct. 195 (1984); Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983); and Oman v. Johns-Manville Corp., 764 F.2d 224 (4th

Cir. 1985). The claims against the manufacturers typically assert that their asbestos-containing products were defectively manufactured, labelled or marketed. The "wrong," if any, in such claims occurs far from the sea in the plants where the products are made, packaged and shipped. Obviously, whether this alleged "wrong" causes an injury on navigable water is wholly fortuitous since the insulation products in question can as easily end up on the pipes or boilers of an office building heating system or in a power plant as on the steam pipes of a ship.

The need for uniformity, which is a prime motive for the application of maritime law to vessel owners, is virtually non-existent in the case of land-based manufacturers. Historically, the state law of negligence, product liability, or warranty has always

governed the duties of the manufacturer. Indeed, the rights of the several states to provide remedies for their citizens against those selling products within their borders have never been questioned. The duties of the vessel owner, however, whose activities take him from port to port, historically have been the sole province of the maritime law to the exclusion of land-based theories of recovery. Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. 156; and Kermarec v. Compagnie Generale Trans-atlantique, 358 U.S. at 628 [finding error in application of state law to claim of vessel owner negligence made by visitor on board vessel in port].

The First Circuit found it "ironic" that Raymark should contend that its own liability was governed by state law while the vessel's liability was governed by maritime law. (App. A, 38a; 772 F.2d at

1016.) Raymark sees no hint of inconsistency in its position. In the historical development of tort law in this country, the vessel's duties have sprung from federal maritime law and the land-based manufacturer's duties from the state law of negligence, product liability and warranty. In a case criticized by the First Circuit, the Fifth Circuit easily grasped the essential distinction between claims against vessel owners and claims against manufacturers. Hall v. Hvide Hull No. 3, 746 F.2d at 302, n. 16.

The First Circuit's novel proposition that whether a vessel poses an unreasonable danger to those legitimately on board is "better ... left to state tort law" (App. D, 82a) not only portends but constitutes a dangerous and unwarranted erosion of the admiralty jurisdiction of the federal courts and of the uniformity of treatment for vessel owners which is

the historic purpose for the grant of that jurisdiction. In limiting the availability of the section 905(b) remedy to those doing the work formerly done by a ship's crew, the First Circuit has, in effect, supplanted the Executive Jet nexus requirement, which focuses on the nature and source of the wrong, and has adopted a new "status" requirement, which focuses on the victim of the wrong.

III. A Decision by This Court is Needed to Resolve Continued Judicial and Congressional Confusion on the Important Federal Question Whether Section 905(a) Directly Bars Third-Party Claims for Contribution and Indemnity Against LHWCA Employers

In its controversial decision in Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983), this Court held that section 8116(c) of the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), does not directly bar third-party tort claims against the

employer for injuries sustained by an employee. The rationale of decision was a straightforward application of the statutory construction of section 8116(c) first enunciated in Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597 (1963). Since the statute on its face protected the employer only from claims by an employee or by those related to him by blood, marriage, or dependency, this Court in Lockheed concluded that section 8116(c) did not bar a defendant wholly unrelated to the employee from pursuing claims against the employer.

Throughout the Lockheed opinion, this Court repeatedly noted that section 8116(c) and section 905(a) of the LHWCA are virtually identical and impliedly ruled that they should be given the same interpretation. Indeed many of the cases discussed by this Court in reaching its conclusions in Lockheed were decisions

construing section 905(a) or its predecessor.

Since this Court has treated section 8116(c) and section 905(a) as twin sisters, it is not surprising that in virtually every opinion since Lockheed in which section 905(a) has been construed, the lower courts have begun their analyses with Lockheed itself. In three published district court opinions, including one by the Honorable Edward T. Gignoux in a Maine asbestos case, it has been held that section 905(a) does not bar third-party claims for contribution or tort indemnity against employers by defendants, who, like Raymark, are unrelated to the employee/plaintiff. In re All Asbestos Cases, 603 F. Supp. 599, 604-05 (D. Ha. 1984); Colombo v. Johns-Manville Corp., 601 F. Supp. 1119, 1136-38 (E. D. Pa. 1984); In re All Maine Asbestos Litigation (BIW Cases), 589 F. Supp. 1563, 1567, 1570-71 (D. Me. 1984).

In the decision below, however, the First Circuit held that section 905(a) directly bars Raymark's claims. (App. A, 59a - 66a; 772 F.2d at 1015-16.) In reaching this conclusion, the First Circuit relied on the very cases discussed and distinguished by this Court in Lockheed in reaching the opposite conclusion. Simply put, the First Circuit's rationale was that section 905(a) may be construed differently from section 8116(c) despite their virtually identical texts and the identical constructions given them in Lockheed itself. (App. A, 55a; 772 F.2d at 1020.)

Lockheed has also been a source of confusion to Congress. In introducing on the Senate floor the conference committee's report on the 1984 amendments to the LHWCA, Senator Nickles stated that the conferees thought that Lockheed could

be read to allow third-party claims against LHWCA employers because of the near identical texts of section 8116(c) and section 905(a). He indicated that the conferees had considered amending section 905(a) because of Lockheed. 130 Cong. Rec. 11621 (daily ed. Sept. 20, 1984).

At the same proceeding Senator Hatch spoke at length on the controversy surrounding Lockheed's application to the LHWCA. He noted that in a Maine asbestos case section 905(a) had been construed to allow third-party claims against an LHWCA employer. Senator Hatch proved himself to be well informed on the legal arguments and precedents which affect the existing interpretations of section 905(a), most of which appear in the Lockheed opinion itself. Finally, he indicated that the amendments did not attempt to resolve the controversy about

the employer's immunity from suit under section 905(a) after Lockheed, and, more importantly, that to do so legislatively the committee would have had to examine all aspects of the tripartite relationship between the employer, the employee and the third party and to consider such matters as the employer's recoupment from the third party of benefits paid the employee, and the possibility of double recoveries by an employee who might receive both compensation benefits and tort damages. 130 Cong. Rec. 11625-11626 (daily ed. Sept. 20, 1984).

It is apparent from the inconsistent lower court opinions cited above and from the statements of the Senators involved in drafting the 1984 amendments that Lockheed's applicability to the LHWCA is not clearly understood. Since the interests of all LHWCA employers, employees, and the third parties, like

Raymark, with whom they deal, are affected more by section 905 than by any other section of the LHWCA, a decision by this Court on the scope of the Lockheed holding is urgently needed.

IV. The Decision of the Court of Appeals Creates a Conflict Among the Circuits on the Important Federal Question of What Employer Immunity Provision Applies When a Case Falls in the Zone of Concurrent Jurisdiction Created by the Overlap of the LHWCA and the State Workers' Compensation Scheme.

The interaction and overlap of the LHWCA with state workers' compensation schemes has been the subject of numerous decisions by this Court. In its comprehensive opinion in Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715 (1980), this Court fully discussed the various cases which had set the border between the LHWCA and the state schemes prior to the 1972 amendments to the LHWCA. This border was so vaguely defined before 1972 as to prompt this Court to refer to it as

an area of overlap or "twilight zone." Davis v. Dept. of Labor, 317 U.S. 249, 256 (1942).

Because of the 1972 amendments which extended the LHWCA shoreward, and this Court's interpretation of them in Sun Ship, what once was a narrow twilight zone is now a broad zone of concurrent jurisdiction between the LHWCA and all state compensation acts. As this Court noted in Sun Ship, the LHWCA is now "a source of relief for injuries which had always been viewed as the province of state compensation law." Sun Ship, Inc. v. Pennsylvania, supra at 719.

In the decision below, the First Circuit ruled that under the holding and reasoning of Sun Ship both the LHWCA and the Maine Workers' Compensation Act (MWCA) applied to the injuries sustained by Forrest Drake. (App. A, 58a; 772 F.2d at 1021.) It then reasoned that BIW

as the employer would be entitled to assert its immunity from suit as given by both the MWCA, 39 M.R.S.A. § 4, and the LHWCA, 33 U.S.C. § 905(a). (App. 58a-66a; 772 F.2d at 1021-1022.) The First Circuit held that Raymark's state law claims against BIW as owner and operator of the shipyard at which Forrest Drake worked were barred by section 4 of the MWCA, 39 M.R.S.A. § 4. (App. A, 66a; 772 F.2d at 1021.) Since the First Circuit held that section 905(a) also barred Raymark's claims, it did not reach the issue whether section 905(a) would preempt the immunity provided by the Maine act in the event of a conflict between the two immunity provisions.

The First Circuit's decision to apply both the employer immunity provision of the LHWCA and that of the MWCA is troublesome because neither Forrest Drake, his widow, nor any of his

dependents applied for or received MWCA benefits. In Sun Ship and in Lockheed Aircraft Corp. v. United States, 460 U.S. at 194, this Court noted that the foundation of the LHWCA, and, indeed, any workers' compensation scheme, was the surrender by the employee of his common law remedies against his employer in exchange for the employer's acceptance of new liabilities to the employee, i.e., the payment of set compensation benefits. This quid pro quo, however, is overlooked in the First Circuit's analysis because the employer is allowed to claim the protection of the MWCA for payment of LHWCA benefits.

Not surprisingly the First Circuit's decision brings it into conflict with the decision of a sister circuit. In Jenkins v. McDermott, 734 F.2d 229 (5th Cir.), modified on other grounds, 742 F.2d 191 (5th Cir. 1984), the Fifth Circuit held

that the compensation act under which benefits were paid would govern the nature and scope of the employer's immunity in subsequent tort litigation. In other words, the election of what benefits to receive by the employee governs the scope of the employer's protection:

> [T]he state defense founded upon the state compensation act's coverage scheme, whereby in statutory exchange for his state compensation remedy an injured workman accepts it as the exclusive remedy against his employer and his employer's principal (as 'statutory employer'), cannot survive a rejection of the state act's coverage and the election, instead, of the federal remedy.

Jenkins v. McDermott, 734 F.2d at 234.

The resolution by this Court of the conflict between the First and Fifth Circuits is especially important in light of the broad zone of concurrent jurisdiction of the LHWCA and the state acts established by the 1972 amendments and the holding in Sun Ship. Because of the

shoreside expansion of the LHWCA into areas traditionally governed solely by state compensation schemes, one can expect that many, if not most, injuries to shipyard workers will be compensable under either state or federal law. Thus, the problem of which employer immunity provision governs in subsequent tort litigation will recur frequently. As the Jenkins case shows, the outcome of the case is often determined by which act governs.

RELATED CASE

The questions raised in this Petition will also be raised in a Petition for Writ of Certiorari to be filed shortly in In re All Maine Asbestos Litigation (PNS Cases), 772 F.2d 1023 (1st Cir. 1985). In All Maine the First Circuit considered the viability of third-party claims that are virtually identical to the claims in

this case. All Maine, however, involves over 200 separate cases in which contribution and indemnification claims have been brought against the United States for its willful negligence as owner of the Portsmouth Naval Shipyard and as owner of the vessels built and repaired at that yard. The claims in All Maine are predicated upon the Federal Tort Claims Act, 28 U.S.C. § 1346(b), 2671 et seq., which provides that the Government "shall be liable ...[in tort] in the same manner and to the same extent as a private individual under like circumstances. ..." 28 U.S.C. § 2674. In All Maine the First Circuit reasoned that the "private individual" most analogous to the United States is BIW and, therefore, it concluded that its opinion in Drake, which the All Maine panel referred to as a "companion case," In re All Maine Asbestos Litigation (PNS Cases), 772 F.2d

at 1028, establishes that all of the claims against the Government are non-maritime and, notwithstanding this Court's decision in Lockheed, that they are directly barred by the employer immunity enjoyed by the United States.

CONCLUSION

For the foregoing reasons Raymark respectfully submits that this Court should grant a Writ of Certiorari to review the decision of the Court of Appeals. When all the issues outlined above which arise from the First Circuit's decision are considered, it is clear that this Petition provides the Court with a unique opportunity. The serious controversies and conflicts in the law of employer immunity from suit under the LHWCA, which so vex the lower courts and Congress alike, can be resolved by this Court in this case in a single opinion.

Additionally, a Petition for Writ of Certiorari will be filed in less than ten days time in the companion case of In re All Maine Asbestos Litigation (PNS Cases), 772 F.2d 1023. In All Maine substantially the same issues will be raised, but the focus will be upon the employer immunity provided to the United States under the Federal Employees' Compensation Act (FECA). Because section 905 of the LHWCA and section 8116(c) of FECA are virtually identical, this Petition and the Petition to be filed are ripe for consolidation. Thus, this Court can now resolve the important issues arising from the employer immunity provisions of both federal compensation schemes in one, comprehensive opinion.

Respectfully submitted,

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Raymark Industries, Inc.:

THOMPSON, McNABOE & ASHLEY

Benjamin Thompson

Thomas R. McNaboe

Mark G. Furey

Edward S. MacColl

CERTIFICATE OF SERVICE

I, Benjamin Thompson, Esq., certify that on or before the 21st day of January, 1986, I mailed, postage prepaid, forty (40) copies of the Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit to the Clerk of the Supreme Court of the United States, One First Street N.E., Washington, D.C. 20543, and mailed three (3) copies, postage prepaid, to Robert F. Hanson, Esq., Norman & Hanson, 415 Congress Street, Portland, Maine 04101, counsel for Respondent, Bath Iron Works Corporation, and mailed three (3) copies, postage prepaid, to Peter J. Rubin, Esq., Bernstein, Shur, Sawyer & Nelson, One Monument Square, Portland, Maine 04101, counsel for Owens-Illinois, Inc., Celotex Corporation, Pittsburgh Corning Corporation, H. K. Porter Company, Inc.,

Southern Textile Corporation, Inc., Keene Building Products Corporation and Owens-Corning Fiberglas Corporation.

Ben Thompson

Benjamin Thompson

APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 84-2033

MILDRED V. DRAKE,
Plaintiff, Appellee,

v.

RAYMARK INDUSTRIES, INC., ET AL.,
Defendants and Third-Party Plaintiffs,
Appellants.

No. 84-2034

MILDRED V. DRAKE,
Plaintiff, Appellee,

v.

RAYMARK INDUSTRIES, INC., ET AL.,
Defendants and Third-Party Plaintiffs,
Appellees.

BATH IRON WORKS CORPORATION,
Third-Party Defendant, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
[Hon. Edward T. Gignoux, Senior U.S. District Judge]

Before
Campbell, Chief Judge,
Bownes and Torruella, Circuit Judges.

Mark G. Furey, with whom Thomas R. McNaboe, Thompson, McNaboe & Ashley, Bernstein, Shur, Sawyer & Nelson, Hunt, Thompson & Bowie, Verrill & Dana and Skelton, Taintor, Abbott & Orestis were on brief for Raymark Industries, Inc. Robert F. Hanson with whom James D. Poliquin and Norman & Hanson were on brief for Bath Iron Works Corporation.

August 27, 1985

BOWNES, Circuit Judge. This is an appeal from a summary judgment granted third-party defendant-appellee Bath Iron Works Corporation (BIW or Shipyard) on claims against it for contribution or indemnity by defendants and third-party plaintiffs-appellants Raymark Industries, Inc. and other manufacturers and distributors of asbestos products.

I. BACKGROUND

This is one of approximately fifty cases brought in the District Court of Maine by present and former employees of BIW, or the representatives of their estates, against a large number of manufacturers and suppliers of asbestos products. BIW is in the shipbuilding and ship repair business. The complaints in the primary actions seek compensatory and punitive damages for injuries the employees of BIW allegedly sustained from

exposure to appellants' products during the course of their employment at the Shipyard.

With the approval of the district court, the defendants-appellants filed a Model Third-Party Complaint against BIW in each of the actions against them. The case at bar tests the soundness of the district court's ruling on motion for summary judgment that none of the six counts of the Model Third-Party complaint could be maintained. We restate the allegations in the complaint seriatim.

Count I alleges that BIW knew or should have known that the material it purchased for use in the construction and/or repair of ships included asbestos and products containing asbestos, and that its employees would come into contact with such materials; that BIW knew or should have known that working with asbestos and products containing

asbestos posed unreasonable health dangers unless adequate precautionary measures were taken; that BIW wantonly, recklessly and negligently failed to exercise due care vis-a-vis its employees in ten specific ways; that any damages to plaintiffs were caused by BIW; that any judgment against the defendants should be reduced by the amount of BIW's workers' compensation lien under the Longshoremen and Harbor Workers Compensation Act (LHWCA) or, in the alternative, the defendants are entitled to a judgment against BIW in the amount of such liens. Defendants also seek declaratory relief that BIW be ordered to pay directly to them any future workers' compensation benefits to which the plaintiffs became entitled.

Count II seeks contribution or indemnity for any punitive damage judgments for the plaintiffs.

Count III alleges that the construction of and/or repair of ships involving asbestos and products containing asbestos were inherently dangerous activities; that defendants had no control over the products sold once they were in the possession of BIW; that BIW owed defendants a duty, independent of any duty to its employees, not to use asbestos and products containing asbestos in such a willful, wanton, reckless or negligent manner as to make them unreasonably hazardous to BIW employees or other persons; that defendants' products were not dangerous to BIW employees if used with due care; that defendants are entitled to be indemnified by BIW to the full extent of any judgments against them or, in the alternative, to the extent of BIW's worker's compensation liens.

Count IV alleges a claim for contribution for any damages for consequential and punitive damages recovered by plaintiffs against defendants, including loss of consortium.

Count V alleges that BIW had a duty to provide medical examinations, diagnosis, and treatment for the illness of its employees; that BIW's medical personnel wantonly, recklessly and negligently failed to perform their duties; that such failure caused or aggravated the asbestos-related diseases of the employees; that defendants are entitled to contribution and indemnification by BIW for any judgments against them or, in the alternative, to indemnification to the extent of BIW's workers' compensation lien.

Count VI alleges that BIW was the owner or owner pro hac vice of the vessels upon which its employees worked

within the meaning of 33 U.S.C. § 902(21); that BIW acted willfully, wantonly, recklessly and negligently as owner or owner pro hac vice; that BIW's conduct was the proximate cause of the damages claimed by plaintiffs; that under 33 U.S.C. § 905(b), BIW is liable to plaintiffs for all damages claimed in their complaints against defendants.

With one exception, all of the claims for contribution and/or indemnity are based on alleged breaches of duty by BIW to its employees. The exception is paragraph 19 of Count III which states in pertinent part: "BIW owed defendants a duty, independent of any duty it owed its employees, not to employ" the asbestos materials so as to make them unreasonably dangerous to the employees or others. Defendants failed to state whether the alleged duty is based on tort or contract. Nor did they allege the

existence of an express or implied contract between BIW and the defendants regarding the use of asbestos material. The defendants, then, "are asking us to hold a user liable to a manufacturer for the former's negligent use of the latter's defective product." Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 723 (2d Cir. 1978) (Friendly, J.). Like the Second Circuit, "[t]his we decline to do." Id.; cf. 2A Larson, The Law of Workmen's Compensation § 76.84 at 14-746 (1985) ("But when a purchaser buys a product, does he make an implied contract with the manufacturer to use the goods in such a way as not to bring liability upon the manufacturer? This would be stretching the concept of contract out of all relation to reality."). The district court did not expressly rule on this claim, probably because it was not pressed below. Certainly, the defendants

have not adverted to it at all in their brief to this court. Given these circumstances, we consider this claim to have been dropped but, in any event, we rule that it must be dismissed for failure to state a cause of action upon which relief can be granted. The basis of liability for defendants' third-party action is, therefore, grounded solely on BIW's alleged breach of duties to its employees.

The district court rendered three separate opinions. On Counts I through V, which we shall refer to as the land-based or nonmaritime claims, the court granted summary judgment for BIW, excepting only those claims for pro tanto indemnification. 589 F. Supp. 1563 (D. Me. 1984). The court based its ruling on the grounds that the exclusivity provision of the Maine Workers Compensation Act (MWCA), Me. Rev. Stat.

Ann. tit. 39, § 4 (1978 and Supp. 1983-84), had been interpreted by the Maine Supreme Judicial Court to bar all noncontractual rights of contribution and indemnity. McKellar v. Clark Equipment Co., 472 A.2d 411, 416 (Me. 1984); Roberts v. American Chain & Cable Co., Inc., 259 A.2d 43, 51 (Me. 1969). In a subsequent opinion, the district court granted summary judgment for BIW on the pro tanto claims.

> Because no benefits have been paid to Forrest Drake, his widow or his dependents under the Maine Workers' Compensation Act, and BIW and its insurer have waived any workers' compensation lien under the LHWCA, there is no predicate for the pro tanto relief sought by defendants against BIW in their third-party complaints.

On Count VI the district court held "that BIW was not during the relevant periods the owner pro hac vice of vessels being constructed or repaired in its yard and that the cause of action asserted in

Count VI of R-M's third-party complaints is therefore barred by Section 905(a) of the LHWCA."

We shall review first the district court's disposition of Count VI, for contribution based on the alleged negligence of the BIW qua shipowner vis-a-vis the injured employees. We then evaluate the court's disposition of the land-based claims. Our ultimate conclusion is the same as the district court's--that none of the counts contained in the model third-party complaint can withstand a motion for summary judgment--although we reason to that conclusion via a different route.

II. THIRD-PARTY LIABILITY AS A SHIPOWNER UNDER § 905(b)

In Count VI of their Model Third-Party Complaint, defendant manufacturers press a claim against Bath Iron Works for

shipowner negligence, purportedly based on the Longshore and Harbor Workers' Compensation Act[1] (LHWCA or Longshore Act), 33 U.S.C. § 905(b). Defendants correctly claim that determinations regarding the viability of § 905(b) negligence claims are governed by federal maritime principles. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523 (1983); Scindia Steam Navigation Co. v. De Los Santos, 451 U.S. at 165 n.13 (1981). Turning to the statute, the pertinent language reads as follows:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of

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1. Congress has modified the name of the Act by changing "Longshoremen" to "Longshore." See Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, § 27(d).

> this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

33 U.S.C. § 905(b) (emphasis added).

In the case before us, the injured employee's representative did not bring an action against BIW as shipowner pro hac vice, or against any other shipowner; she filed no § 905(b) action whatsoever. Instead, she filed strictly nonmaritime, state causes of action against the various asbestos product manufacturers and suppliers based on Maine law and grounded on diversity jurisdiction. Her claims involved strict liability, breach of warranty and negligence. Despite the nonmaritime nature of these primary claims, defendants seek to assert § 905(b) as a basis for indemnity or contribution[2] from BIW, which by its

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2. Defendants allege no contractual
(Footnote 2 Continued on Next Page

terms confers authority to bring a shipowner negligence action upon the injured employee or his/her representative, and the employer as statutory assignee. See 33 U.S.C. § 933(b): Rodriquez v. Compass Shipping Co., Ltd., 451 U.S. 596 (1981).

Although contribution has a long and venerable history in admiralty and maritime affairs, see Cooper Stevedoring Co. v. Kopke, 417 U.S. 106 (1974); see generally Staring, Contribution and

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(Footnote 2 Continued from Previous Page) basis for indemnity but only noncontractual indemnity. As the noncontractual indemnity here appears to be based upon tort theory, see Zapico v. Bucyrus-Erie Co., 579 F.2d 714, 718 (2d Cir. 1978), and is in effect only a more extreme form of contribution, see, id., we shall refer henceforth only to defendants' right to contribution. Clearly, if defendants have no right to partial contribution based on applicable tort principles, they have no right to indemnification of the whole of their damages based on those same tort principles.

Division of Damages in Admiralty Cases, 45 Calif. L. Rev. 304 (1957), we doubt whether a contribution action premised solely upon § 905(b) can proceed without having as its predicate a § 905(b) primary action properly brought by one of the parties authorized by the statute. Especially in a situation such as this, where the primary action is based on distinctly nonmaritime rights and duties--duties owed by any manufacturer of a product later determined to be defective and which bear no significant relationship to maritime commerce--it seems that defendants cannot use § 905(b) as a source of a right to contribution from a shipowner or owner pro hac vice. Our study of the decisional law failed to uncover any cases where § 905(b) was allowed to be asserted as the basis for liability in a third-party action where it was not sued upon in a primary action.

We note, however, that the parties did not raise or brief this question. We therefore shall bracket this question and assume arguendo that defendants are not barred from bringing a contribution action based on the plaintiff's omission of a § 905(b) claim in her action.

Appellee BIW contends that defendants' § 905(b) action cannot be maintained because the injury allegedly caused by BIW's dereliction of duty as a shipowner pro hac vice was not a maritime tort, which is a fundamental requirement for an injury to be cognizable under § 905(b). The appellants respond by arguing that an independent basis for admiralty jurisdiction need not be shown to redress an injury under the section; all that is required is satisfaction of the literal words of the statute, which does not so much as mention the words "maritime tort" or "admiralty jurisdiction."

The question before us, then, is: does § 905(b) recognize only maritime torts, i.e., torts cognizable in admiralty (regardless of the actual basis of jurisdiction, such as diversity), or does its range encompass nonmaritime torts occurring on a vessel but where the tests for admiralty jurisdiction are not satisfied? After careful study, we think the scope of § 905(b) is limited to maritime torts. To explain our conclusion, we must examine the definition of the term "maritime tort," retrace the origin of § 905(b) in the warranty of seaworthiness, and demonstrate why the alternative conclusions about the scope of § 905(b) that have been advanced fail to accord with logic, the legislative history of the section, and the admiralty "traditions of simplicity and practicality." Kermarec v. Compagnie

Generale Transatlantique, 358 U.S. 625, 631 (1959); The Lottawanna, 88 U.S. (21 Wall.) 558, 575 (1874).

A. Maritime Tort

It is elementary, almost axiomatic, that maritime torts are those which fall within the admiralty jurisdiction or satisfy the tests for the application of admiralty law. Executive Jet Aviation v. Cleveland, 409 U.S. 249 (1972), makes this point plainly: "[d]etermination of the question whether a tort is 'maritime' and thus within the admiralty jurisdiction of the federal courts . . . ." Id. at 253 (emphasis added); see also Victory Carriers, Inc. v. Law, 404 U.S. 202, 204 (1972). The Court in Executive Jet began its analysis of the proper scope of maritime tort jurisdiction from this premise, and rejected the traditional dependence of the determination solely upon the "locality

of the wrong." Id. The Court concluded that a showing of a "relationship of the wrong to traditional maritime activity is often more sensible and more consonant with the purposes of maritime law than is a purely mechanical application of the locality test." Id. at 261; see also Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir.), cert. dismissed, 104 S. Ct. 34 (1983). In Foremost Insurance Co. v. Richardson, 457 U.S. 668, 673 (1982), the Court held that this two-pronged situs and status test must be met in all actions sought to be governed by admiralty law.

Before Executive Jet, then, to be classified as a maritime tort the wrong had to fall within admiralty jurisdiction, which in turn required only that the wrong occur or take effect on navigable waters. Foremost Insurance, 457 U.S. at 672; Kermarec v. Compagnie

Generale, 358 U.S. at 628; Williams v. Avondale Shipyards, Inc., 452 F.2d 955, 958-59 (5th Cir. 1971). One special maritime tort action, the strict liability unseaworthiness action for stevedores and other shorebased maritime workers, however, required that additional elements besides admiralty jurisdiction be satisfied. To fasten liability without fault onto a vessel and its owners, the courts also required that the vessel be "in navigation," Waganer v. Sea-Land Service, Inc., 486 F.2d 955, 958 (5th Cir. 1983): see also Williams v. Avondale, 452 F.2d at 957; G. Gilmore & C. Black, The Law of Admiralty 441 (1975), and that the injured worker or his work group be engaged in traditional "ship's work," not some land-based specialty work. West v. United States, 361 U.S. 118, 122 (1959); United pilots Association v. Halecki, 358 U.S. 613 (1959).

The unseaworthiness action, despite its strictures, engendered a vast amount of litigation and imposed great costs upon stevedore employers and shipowners, which resulted in congressional abolition of it through the passage of § 905(b). We briefly review the genesis and history of the unseaworthiness action before turning to examine the legislative history of § 905(b) and the other 1972 Amendments to the LHWCA.

B. Unseaworthiness

Almost twenty years after the original passage of the Longshore Act, the Supreme Court was confronted with a case where a stevedore, injured when a ship's winch and boom broke, sought to sue the ship and its owner for damages. The Court held that the ship's obligation of seaworthiness, traditionally owed by ships to seamen, extended to a stevedore who was injured while aboard the vessel

and incurring seamen's hazards. Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946). The unseaworthiness claim so authorized omitted any requirement that a shipowner's negligence or fault in causing the injury be proven. In Sieracki, the Court stated that its holding did not conflict with the Longshore Act because the LHWCA did not foreclose personal injury actions under general admiralty law except against the employer. Id. at 101. Commentators have since suggested that Sieracki was a direct result of the failure of Congress to improve the paltry compensation payable under the LHWCA and raise the incentives for safety in the shipping industry. G. Gilmore & C. Black, The Law of Admiralty at 446-48.

Ten years later, with "Sieracki-seamen" suits flourishing, the Court was again confronted with a seeming inequity.

The absolute nondelegable seaworthiness warranty imposed upon a shipowner had resulted in shipowner liability even where others, chiefly the stevedoring companies, were responsible for the workers' injuries. In Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956), the Court decided that the vessel could recover the damages for which it was liable to the injured longshoreman from the stevedore company if it had breached an express or implied warranty of workmanship performance owed the vessel. Thus was erected the final leg of the triangular damage suits which had originated with Sieracki.

Congress undertook a comprehensive reform of the Longshore Act in 1972, including as a prime element the abolition of the Sieracki-Ryan unseaworthiness action for covered workers. See Aparicio v. Swan Lake, 643

F.2d 1109 (5th Cir. 1981). In its place a complex quid pro quo was effectuated which included for covered workers higher compensation for injuries, and the option of bringing a negligence action against the vessel if the injury was caused "by the negligence of a vessel." 33 U.S.C. § 905(b); see Scindia Steam Navigation, 451 U.S. at 164-66. Strict liability actions under unseaworthiness theory and contribution or indemnity from an employer based on express or implied warranties were expressly barred. 33 U.S.C. § 905(b).

Our review of the origin and demise of longshore and harbor workers' unseaworthiness actions has led us to conclude that § 905(b) implicitly requires that a tort be consummated within the admiralty jurisdiction to be cognizable under the statute. The maritime tort action for negligence was a

feature of the common law of admiralty prior to Sieracki-Ryan, when one group of torts involving longshore workers, those committed on board a vessel lying in navigable waters, were excepted from the negligence standard and given strict liability treatment. Section 905(b) was enacted to bar this special treatment, and essentially returned the applicable law to its pre-Sieracki state, when negligence had to be proven to obtain damages from a vessel.

Three circuits in addition to ourselves have determined that Congress enacted § 905(b) not to create a new cause of action for any compensation system-covered worker but to abolish the judicially-authorized unseaworthiness action fashioned for longshore workers "injured on navigable waters while working on a ship . . . ." Pope & Talbot, Inc. v. Hawn, 346 U.S. 406, 409

(1953); see H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Ad. News 4698, 4702 (hereinafter H.R. Rep.). The former Fifth Circuit rendered the first decision on the question of the scope of actions that can properly be brought under § 905(b). It held that the legislative history of the 1972 Amendments to the Longshore Act "leaves little doubt that Congress did not intend § 905(b) to create a new or broader cause of action in admiralty." Parker v. South Louisiana Contractors, 537 F.2d 113, 118 (5th Cir. 1976). The Fourth Circuit followed suit shortly thereafter in Holland v. Sea-Land Service, 655 F. 2d 556 (4th Cir. 1976), and held that only maritime torts are cognizable under the provision, "torts cognizable under traditional federal admiralty jurisdiction . . . ." Id. at 558. The Holland court specifically

determined that § 905(b) "preserves [the employee's] right under prior law to recover for third-party negligence, but it does not expressly enlarge the traditional jurisdiction of admiralty over maritime torts." Id. at 559. In Christoff v. Bergeron Industries, Inc., 748 F.2d 297, the new Fifth Circuit reaffirmed the earlier ruling in Parker and stated that "§ 905(b) neither extended the boundaries of traditional admiralty jurisdiction nor converted ordinary tort claims against vessels into federal questions independent of admiralty." Id. at 298. The Eleventh Circuit found these earlier rulings persuasive authority for its holding that § 905(b), "rather than creating a new cause of action, merely preserves certain preexisting remedies to injured workers against third parties." Harville v. Johns-Manville Products Corp., 731 F.2d 775, 778 n.9 (11th Cir. 1984).

Having concluded that only torts that are maritime are cognizable under § 905(b), the governing principles for determining whether admiralty law will apply[3] are provided by Executive Jet Aviation, Inc. v. Cleveland, 409 U.S. 249, as extended by Foremost Insurance Co. v. Richardson, 457 U.S. 668. Because defendants' third-party § 905(b) action is predicated solely upon BIW's alleged dereliction of duty qua shipowner pro hac vice vis-a-vis its employee Drake, and not based upon any alleged duty running from BIW to defendants, the proper question is whether plaintiff Drake could have maintained a § 905(b) action against

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3. For a discussion of the difference between the application of admiralty law and assertion of admiralty jurisdiction, see our discussion in Austin v. Unarco Industries, Inc., 705 F.2d at 6 n.1; see also Kermarec v. Compagnie Generale, 358 U.S. 625, 628 (1959); Harville v. Johns-Manville Products Corp., 731 F.2d at 778-779.

BIW for his injuries. Accordingly, we look to whether the injury forming the basis of Drake's primary action would be cognizable in admiralty, or have admiralty law applied to it.

We consider our decision in Austin v. Unarco to have provided the channel markers for deciding that question. As we held there, to qualify as a maritime tort under Executive Jet, the wrong (1) must have occurred on navigable waters, i.e., meet a situs or locality test, and (2) must have borne a significant relationship to a maritime activity, i.e., meet a nexus test. Austin v. Unarco, 705 F.2d at 8-14. Thus, although we believe that it is necessary for the maintenance of a § 905(b) action that a party allege that a vessel's negligence was the source of the injury, such an incantation does not, as defendants contend, automatically result in the application of admiralty law.

Turning to the Executive Jet criteria, we first consider the situs requirement, i.e., that the injury occur or take effect on navigable waters. As the Eleventh Circuit noted in Harville, "when an injury is the result of a number of exposures, only some of which occurred in a maritime situs, and where the effects of the various exposures are indivisible," the question whether the situs test is met is raised. Harville, 731 F.2d at 782. That court concluded, in agreement with the Second,[4] Fourth[5] and Ninth Circuits,[6] the requirement was

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4. Keene Corp. v. United States, 700 f.2d 836 (2d cir.), cert. denied, 104 S.Ct. 195 (1983).

5. White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981), cert. denied, 454 U.S. 1163 (1982), vacated on other grounds sub nom. Oman v. Johns-Manville Corp., Nos. 82-1821, 82-2042, slip.op. (4th Cir. June 6, 1985) (en banc).

6. Owens-Illinois v. United States District Court, 698 F.2d 967 (9th Cir. 1983).

met "if the plaintiff has been exposed to asbestos on navigable waters regardless of whether he has also suffered exposures on land." Id. We see no reason to depart from the majority view on this question and we adopt it as our own. Thus, as in Austin v. Unarco, from our review of the record the situs requirement poses no problem to the characterization of Drake's injury as a maritime tort and "[t]he only issue, therefore, is whether the wrong bears a significant relationship to traditional maritime activity." Austin v. Unarco, 705 F.2d at 8-9; see Executive Jet, 409 U.S. at 261.

Since our decision in Unarco, several other courts have considered Executive Jet's second requirement of a nexus to maritime activity in relation to asbestos injuries sustained by shipyard workers. All have reasoned to the same conclusion

albeit using somewhat different markers en route. Compare, e.g., Harville v. Johns-Manville Products Corp., 731 F.2d 775; Lowe v. Ingalls Shipbuilding, 723 F.2d 1173, 1187-90 (5th Cir. 1984); Austin v. Unarco, 705 F.2d 1; Keene Corp. v. United States, 700 F.2d 836, 84345 (2d Cir. 1983), cert. denied, 104 S. Ct. 195 (1984); Owens-Illinois, Inc. v. United States District Court, 698 F.2d 967 (9th Cir. 1983).

In Unarco, we focused on the nature of the decedent's job rather than the type of project--vessel construction or repair--on which he worked. We concluded that the plaintiff was entitled to invoke admiralty only if the decedent was "injured while doing work traditionally done by members of the crew and thus, presumably, subject to many of the same hazards as seamen." 705 F.2d at 12. We ruled that because the decedent had been

engaged in work "requiring special equipment and skills" not commonly found among the members of the ship's crew, admiralty law was not applicable to plaintiff's claims. Id. at 12-13. Other courts prior to the Eleventh Circuit's ruling in Harville focused on other criteria. The Harville Court, however, summarized and blended these various considerations, including our own, into a four-part test which harmonized with Kelly v. Smith, 485 F.2d 520 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974), and Foremost Insurance Co. v. Richardson, 457 U.S. 668. The criteria to be considered under this approach are the function and roles of the parties, the type of vehicles and instrumentalities involved, the causation and type of injury, and traditional concepts of the role of admiralty law. This four-part approach to determining whether the tort

possesses a sufficient nexus to traditional admiralty concerns has since been adopted by the Ninth Circuit, see Myhran v. Johns-Manville Corp., 741 F.2d 1119 (9th Cir. 1984), the Fifth Circuit, see Woessner v. Johns-Manville Sales Corp., 757 F.2d 634 (5th Cir.1985), and by the Fourth Circuit en banc in a case overturning its lone decision holding that admiralty law applied to asbestos torts suffered by shipyard workers, see Oman v. Johns-Manville Corp., Nos. 82-1821, 82-2042, slip op. (4th Cir. June 6, 1985) (en banc overruling of White v. Johns-Manville Corp., 662 F.2d 234 (4th Cir. 1981)). The Harville approach to determining the nexus prong of the Executive Jet test also seems to us to be the best formulation yet set forth because it integrates a wide variety of

traditional concerns of admiralty law. Accordingly, we adopt this approach.[7]

With our course thus fixed, we recognize that what appeared to be a pioneer voyage is actually just another routine trip. Among all six circuits that have considered the question, the universal conclusion is that admiralty law does not apply to these torts. We need not retrace the steps taken by the Eleventh Circuit in Harville nor ours in Unarco to show why the nexus prong of Executive Jet has not been satisfied here; suffice it to say that the facts here are essentially the same as in the other cases cited which found that lack of sufficient relation to traditional admiralty concerns negated the

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7. Judge Campbell feels that it is not necessary to fully adopt the Harville approach and would prefer to rest on Unarco.

application of admiralty law.[8] We find

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8. The one quarrel we have with some of our sister circuits is the emphasis they placed on long-term, latent occupational disease as not bearing sufficient maritime connection. See, e.g., Woessner v. Johns-Manville Sales Corp., 757 F.2d 634, 647 (5th Cir. 1985) ("the type of injury involved here bears little if any relationship to maritime navigation or commerce"). We disagree most strongly with this view and point to, e.g., one of that circuit's own cases, Castorina v. Lykes Brothers Steamship Corp., 758 F.2d 1025 (5th Cir. 1985) (Wisdom, J.), where the plaintiff had for many years offloaded sacks of raw asbestos shipped in loose weave burlap bags aboard defendant's ships. Plaintiff's asbestosis was clearly caused by "traditional maritime activity." We think that the proper analytical step is to ask whether the causation of the injury had a sufficient connection to traditional maritime activity, not whether the type of injury, e.g., trauma, latent occupational disease, possessed the necessary nexus. We think that the concern Congress expressed in the 1984 Amendments to the Longshore Act over the difficulties that maritime workers were experiencing in gaining compensation for latent occupational disease bolsters the case for not using the type of injury as part of the hurdle for maritime tort actions. See H.R. Rep. No. 98-570, on P.L. 98-426, 98th Cong., 2d Sess., reprinted

(Footnote 8 Continued on Next Page

it rather ironic, however, that in those other course-making cases it was the asbestos companies who were urging that admiralty law did not apply to the injuries in the primary actions, and now we find basically the same defendants attempting to refute their own prior position. The tort cannot be outside admiralty jurisdiction when sued upon in the primary action and then, by some magic, be transmuted into a maritime tort merely because it is later emphasized that some of the work where the injury occurred was performed upon a ship. That the employees worked primarily upon ships had already been taken into account in

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(Footnote 8 Continued from Previous Page) in U.S. Code, Cong. & Ad. News 2734, 2743 (The Committee "has amended the current law in several significant respects to insure that long-latency occupational disease claimants do not continue to encounter the severe procedural hurdles which the Longshore Act has presented in the past").

the earlier analysis. Our conclusion, then, is that the injury sustained by Drake lacked sufficient connection to the traditional concerns of admiralty, and thus, neither plaintiff nor defendants can bring a § 905(b) negligence action against BIW qua shipowner pro hac vice.

We recognize that there are cases which have either ignored or overlooked the Executive Jet nexus test in determining whether a tort was cognizable under § 905(b). These are Lundy v. Litton Systems, Inc., 624 F.2d 590 (5th Cir. 1980), cert. denied, 450 U.S. 913 (1981),[9] McCarthy v. The Bark Peking,

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9. In Lundy the plaintiff was injured on a vessel which was 97% complete but which had not completed sea trials. The district court had held that an incomplete vessel was not a "vessel" within the meaning of § 905(b) and barred the action. The Fifth Circuit disagreed in a short per curiam opinion, holding that the definition of "vessel" provided in the definitional-section of the LHWCA, 33 U.S.C. § 902(21), encompassed torts suffered on an incomplete vessel such

(Footnote 9 Continued on Next Page

716 F.2d 130 (2d Cir. 1983),[10] and Hall

(Footnote 9 Continued from Previous Page)
as occurred there. The court determined that deciding whether a § 905(b) action was properly-brought was merely a matter of turning to the definitions for "vessel" and "covered employee," and if these elements were satisfied, the action could proceed. Whether § 905(b) encompassed only maritime torts was not raised before the panel, nor did the court consider the question sua sponte.

10. In McCarthy, a painter was injured while painting the mainmast and spars of the Bark Peking, a vessel permanently anchored and used as a museum. The Second Circuit had originally held that the plaintiff was not a covered employee for purposes of LHWCA compensation, and thus the § 905(b) action could not be brought. The Supreme Court vacated the initial decision for reconsideration in light of Director, OWCP v. Perini North River Associates, 459 U.S. 297 (1983), which is an opinion discussing the "status" requirement for LHWCA compensation. On the second trip, the Second Circuit ruled that Perini required that plaintiff be held a covered worker for compensation purposes. The McCarthy court apparently was not asked, and did not consider whether § 905(b) jurisdiction required that the Executive Jet nexus test be satisfied. It is likely that McCarthy has been implicitly

(Footnote 10 Continued on Next Page

v. Hvide Hull No. 3, 746 F.2d 294 (5th Cir. 1984). Of these, only the Hall opinion requires discussion, for it utilizes and extends the analysis used in the prior two cases.

In Hall, the defendant ships were actually hulls floating on navigable water during shipbuilding construction. The question before the court was the same as that in Lundy, viz., whether ships under construction qualified as vessels under § 905(b). The court felt that it was bound by Lundy's holding that torts committed on vessels under construction were cognizable under § 905(b), despite other Fifth Circuit authority holding that maritime tort

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(Footnote 10 Continued from Previous Page) overruled by Congress in the 1984 Amendments to the Longshore Act. See Pub. L. No. 98-426, 98th Cong., 2d Seas.; H.R. Rep. No. 98-570, which proscribes compensation coverage for museum employees.

jurisdiction required satisfaction of the Executive Jet criteria, including a relationship to traditional maritime activity:

> The panel agrees that we are bound by Lundy and that, under the law of the circuit, it must be followed in the absence of en banc overruling. However, the panel also notes that an issue of bancworthy dimension may be presented by the conflict between Lundy's rationale and some expressions in our more recent jurisprudence that an injury to ship construction workers on board a vessel under construction, although on navigable waters, is not a maritime tort, since ship construction is not a maritime business. See, e.g., Lowe v. Ingalls Shipbuilding, A Division of Litton, 723 F.2d 1173, 1185, 1187 (5th Cir. 1984).

Id. at 296 (footnote omitted). The panel's signal for rehearing en banc went unheeded. 746 F.2d at 294 (5th Cir. 1985).

The Hall court attempted to square Lundy with Lowe and Parker v. South Louisiana Contractors, 517 F.2d 113, the

Fifth Circuit's other cases, by asking the question whether § 905(b) jurisdiction extended beyond maritime tort jurisdiction as demarcated by Executive Jet. The court noted that torts occurring on vessels under construction qualified as maritime torts under pre-Executive Jet standards, citing to Williams v. Avondale Shipyards, Inc., 452 F.2d 955, where a ship construction worker working on a launched but uncompleted vessel floating in navigable waters was held entitled under general maritime negligence principles to sue the vessel or its owner for injuries sustained while on the uncompleted vessel in navigable waters. Id. at 958-59. It then declared that the principles of Director, OWCP v. Perini North River Associates, 459 U.S. 297, 320 n.29 (1983), which held that Congress lacked an intention to constrict the boundaries

for LHWCA compensation from those operative pre-1972, were applicable as well to maritime tort jurisdiction under § 905(b). In particular, the Hall court held that the statutory language of § 905(b), which was enacted subsequent to the Williams opinion, was intended to preserve the extent of maritime jurisdiction over a vessel under construction for § 905(b) purposes that had been previously recognized by Williams.[11] Thus, despite Executive Jet's addition of the nexus requirement and the holding of Lowe within its own circuit that ship construction is not a maritime business, the Hall court held that the former range of maritime torts caused by vessel negligence were intended to be grandfathered-in to the § 905(b)

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11. The Hall court did not cite any legislative history to bolster its position.

jurisdictional range and qualify as maritime torts. 746 F.2d at 300.

Insofar as the Hall panel held that only maritime torts are cognizable under § 905(b) we are in agreement. Our disagreement lies in that court's creation of a double standard for maritime tort jurisdiction. For actions brought under § 905(b) the Fifth Circuit would apparently revert to pre-1972, and pre-Executive Jet standards and apply only a situs test; for actions under general maritime jurisdiction, it would require satisfaction of both the situs and nexus tests.

We discern no basis for this construction of the jurisdictional range of § 905(b). Perini was concerned solely with compensation, not with maritime tort jurisdiction, and these two boundaries have for a long time been quite distinct, see infra at 25-26. We have uncovered no

legislative history even intimating that Congress wished to incorporate into § 905(b) the then-current boundaries of maritime tort jurisdiction, and place them beyond the traditional common law powers of the admiralty courts. Under the Fifth Circuit's construction, § 905(b) tort jurisdiction is static and distinct from other maritime tort jurisdiction, and a double standard has been created. This is the inevitable result of the Hall rule even though that court itself states that "we find no . . . distinction intended by Congress between a § 905(b) action and admiralty jurisdiction," 746 F.2d at 300. We have discovered no predicate for the Fifth Circuit's unusual rule in law, logic, legislative history, or policy and we decline to hold that jurisdiction under § 905(b) requires satisfaction merely of

the definitional elements of the provision, and the situs requirement.[12]

The other theory that has been advanced, and uniformly rejected, maintains that when Congress enlarged shoreward the geographic areas where compensation would be payable under the Act as a part of the 1972 Amendments, it implicitly adopted the same geographic range for § 905(b)'s scope. See, e.g., Parker v. South Louisiana Contractors, 537 F.2d 113 (discussing theory that § 905(b) jurisdiction and compensation system-covered areas parallel one

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12. It is inherently difficult to identify a congressional intention to tie § 905(b) jurisdiction to pre-Executive Jet boundaries since § 905(b) was enacted prior to the rendering of the Executive Jet and Foremost Insurance) decision(s). Thus, there was no predicate for the intention the Fifth Circuit ascribes to Congress except as a hypothetical, and none was recorded in the legislative history of the statute.

another). It is not clear whether appellants here subscribe to this or another theory of § 905(b)'s scope; they all but omitted argument on this point and made only the generalized claim that no independent admiralty jurisdiction had to be shown. In any event, an extended response is not necessary.

While the geographic extension shoreward of the range of areas where compensation would be payable under the Act was discussed in great detail in legislative hearings and committee reports, see, e.g., Perini, 459 U.S. at 314 n.24, 317-22; see also Herb's Welding Inc. v. Gray, 53 U.S.L.W. 4275, 4277 (U.S. March 18, 1985), there is no discussion of extending the jurisdictional range of torts cognizable under § 905(b) via negligence actions beyond that allowed for other maritime torts. The one example the House

Committee provided to illustrate its conception of the scope of § 905(b) negligence actions was that of a stevedore who slipped on an oil spill on a vessel's deck while loading or unloading cargo--a classic maritime tort. See H.R. Rep. at 2704. Moreover, the express purpose of enacting § 905(b) was to undo the judicial decisions in Sieracki and Ryan, and their unseaworthiness progeny, id. at 4703, which comprise a species of maritime tort.

Interpreting the scope of § 905(b) jurisdiction to include negligence actions other than maritime torts would federalize torts in an area which currently are governed by state law. We find it difficult to believe that a move this momentous, had Congress intended it, would not have received explicit discussion. Moreover, the Supreme

Court's comments in Victory Carriers directly counsel against an extension of admiralty jurisdiction on such slender evidence as advanced here:

> We are dealing here with the intersection of state and federal law. As the law now stands, state law has traditionally governed accidents like this one. To afford respondents a maritime cause of action would thus intrude on an area that has heretofore been reserved for state law, [and] would raise difficult questions concerning the extent to which state law would be displaced or preempted . . . . In these circumstances, we should proceed with caution in constitutional and statutory provisions dealing with the jurisdiction of the federal courts.

Victory Carriers, 404 U.S. at 211; see also Austin v. Unarco, 705 F.2d at 13. We agree with the Fifth Circuit's views as expressed in Parker v. South Louisiana Contractors, 537 F.2d 113, that there is no evidence that Congress intended to extend § 905(b) tort jurisdiction to encompass the shoreside injuries

occurring on a vessel merely because those injuries would be compensable under the LHWCA.

II. LIABILITY OF BIW IN ITS CAPACITY AS EMPLOYER

We now turn to the land-based third-party negligence claims alleged in Counts I through V, which challenge acts or omissions of BIW in its capacity as an employer. There can be no question that if the MWCA is the governing law, it bars these actions. Section 4 of the Maine Act states that employers who provide workers' compensation "shall be exempt from civil actions because of such injuries either at common law or under sections 141 to 148, under Title 14, sections 8101 to 8118 or under Title 18-A, section 2-804." Me. Rev. Stat. Ann.

tit. 39, § 4 (1978).[13] This provision has been unequivocally interpreted by the Maine Supreme Judicial Court to provide a covered employer with immunity from third-party claims arising from work-related injuries to its employees that "extends to all non-contractual rights of contribution and indemnity." McKellar v. Clark Equipment Co., 472 A.2d at 416; Roberts v. American Chain & Cable Co., 259 A.2d at 51.

Defendants do not dispute the effect of the Maine statute, but argue that it does not apply. Their argument, as we understand it, runs as follows: Plaintiffs' claim for workers' compensation was made under the Longshore

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13. The statutes identified in § 4 relate to employers' liability in the absence of workers' compensation, actions under the Maine Tort Claims Act, and actions for wrongful death.

Act, 33 U.S.C. §§ [illegible]-950, not the Maine Act; therefore, it is the LHWCA that is implicated. This means that it is the exclusivity provision of the LHWCA, § 905(a),[14] that controls and under Lockheed Aircraft Corporation v. United States, 460 U.S. 190 (1983), § 905(a) does not bar third-party actions.

Since the linchpin of defendants' argument is Lockheed, we turn first to that decision. Lockheed involved the crash of a plane manufactured by Lockheed Aircraft Corporation and owned and

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14. The pertinent part of 33 U.S.C. § 905(a) provides:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, . . .

operated by the United States Air Force. The administrator of the estate of a civilian employee of the United States Navy killed in the crash brought suit against Lockheed as the manufacturer of a defective product. Lockheed brought a third-party indemnity action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-80. The question was whether the exclusivity provision of the Federal Employees' Compensation Act (FECA), 5 U.S.C. § 8116(c), barred Lockheed's indemnification action. In holding that it was not a bar, the Court relied heavily on Weyerhaeuser S.S. Co. v. United States, 372 U.S. 597, which had "considered FECA's exclusive-liability provision and carefully reviewed its legislative history." Lockheed, 460 U.S. at 194. The Court stated:

> The Court's reasoning in Weyerhaeuser applies with equal

> force in the present case. The Government advances the same arguments before us now that it unsuccessfully advanced in Weyerhaeuser. To paraphrase the Weyerhaeuser Court's conclusion, "[t]here is no evidence whatever that Congress was concerned with the rights of unrelated third parties, much less of any purpose to disturb settled doctrines of [tort] law affecting the mutual rights and liabilities of private [parties] in [indemnity] cases." Id., at 601. Section 8116(c) was intended to govern only the rights of employees, their relatives, and people claiming through or on behalf of them. These are the only categories of parties who benefit from the "quid pro quo" compromise that FECA adopts.

Lockheed, 460 U.S. at 196 (footnotes omitted).

Defendants seize upon this language to argue that Lockheed swept away the third-party bar of § 905(a) along with that of § 8116(c) of FECA. We disagree. We first point out that neither Weyerhaeuser nor Lockheed implicated the LHWCA. Secondly, the Court stressed

twice in the course of its opinion that the underlying substantive law granting Lockheed a right to indemnification was uncontroverted, 460 U.S. at 192, 199 n.8, and the only question for decision was whether § 8116(c) of FECA interposed a bar to a third-party action against the United States. The holding in Lockheed is carefully and precisely worded:

> The District Court held that Lockheed had a right to indemnity under the governing substantive law, but the Court of Appeals did not rule on that question. Accordingly, we do not consider it. We adhere to the decision in Weyerhaeuser, and hold only that FECA's exclusive-liability provision, 5 U.S.C. § 8116(c), does not directly bar a third-party indemnity action against the United States. We reverse the judgment of the Court of Appeals and remand the case for further consideration consistent with this Opinion.

460 U.S. at 199. Lockheed requires that we determine whether there is a basis in substantive law for defendants' third-

party action against BIW; it does not overrule three decades of consistent Supreme Court jurisprudence regarding the interpretation of § 905(a).

A

BIW's employees are concurrently covered by the MWCA and the LHWCA. In Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 716 (1980), the Court, in a unanimous opinion, held that "a State may apply its workers' compensation scheme to land-based injuries that fall within the coverage of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972. 33 U. S. C. §§ 901-950." After tracing the "evolution of the law of compensation for workers injured in maritime precincts," id. at 717, the Court concluded: "We therefore find no sign in the 1972 amendments to the LHWCA that Congress wished to alter the accepted understanding that federal

jurisdiction would coexist with state compensation laws in that field in which the latter may constitutionally operate under the Jensen doctrine." Id. at 722 (footnote omitted). In Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), the Court held that states are constitutionally barred from applying their compensation systems to maritime injuries and thus interfering with overriding federal policy of a uniform maritime law. The Sun Ship Court emphatically rejected the argument that for compensation "jurisdictional exclusivity is - in 'fact' or in 'law' - implied in the LHWCA." Sun Ship 447 U.S. at 723; see also id. at 723-26.

The holding and reasoning of Sun Ship compel the conclusion that the applicable substantive law here is both the MWCA and the LHWCA. Since there can be no doubt that the Maine Act bars this third-party

action, our next inquiry is as to the effect of § 905(a).

The question is whether a nonvessel tortfeasor who may be found liable for injuries to employees of a LHWCA-covered employer has a right to indemnity or contribution from the employer. Section 905(a) provides in pertinent part:

> (a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . . [Emphasis added.]

Our review of the case law under § 905(a) shows a nearly uniform interpretation of the statute prior to Lockheed. The first Supreme Court case addressing the right of contribution in light of the LHWCA is Halcyon Lines v.

Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 (1952). The facts are simple: an employee of Haenn was injured on one of Halcyon's ships while making repairs; the employee sued Halcyon on the grounds of negligence and unseaworthiness; the jury found Haenn 75% and Halcyon 25% liable. The Court declined to apply the admiralty collision doctrine "that the mutual wrongdoers shall share equally the damages sustained by each, as well as personal injury and property damages inflicted on innocent third-parties," id. at 284, and stated categorically that a right of contribution did not exist in maritime, noncollision cases. Noting the extensive legislation in this field, i.e., the Harbor Workers Act, the Jones Act, the Public Vessels Act, the Limited Liability Act, and the Harter Act, the Court held: "In view of the foregoing, and because Congress while acting in the

field has stopped short of approving the rule of contribution here urged, we think it would be inappropriate for us to do so." Id. at 287. Although the Court did not reach the issue of the impact of § 905(a), later decisions have explained that Halcyon stands for the principle that contribution actions against the compensation-paying employer are barred by § 905(a).

Cooper Stevedoring Co. v. Fritz Kopke, Inc., 417 U.S. 106 (1974), was one of these explanatory decisions. The Supreme Court clarified that "despite the occasional breadth of its dictum, . . . Halcyon stands for a more limited rule than [an] absolute bar against contribution in noncollision cases . . . ." Id. at 111. The Court recognized instead "the well-established maritime rule allowing contribution between joint tortfeasors." Id. at 113.

But this rule was limited by the exclusivity provision of the LHWCA when contribution was sought from the compensation-paying employer of the injured worker. The Cooper Court pointed out that this result was reached in Atlantic Coast Line R. Co. v. Erie Lackawanna R. Co., 406 U.S. 340 (1972), where "Erie, against whom contribution was sought, was the plaintiff's employer . . . ." Cooper, 417 U.S. at 114. The Court stated that it had ruled Erie to be "entitled to the limitation of liability protections of the Harbor Workers' Act, just like the employer in Halcyon." Id. And again, it stated, "Erie was accordingly entitled to the protective mantle of the Act's limitation-of-liability provisions." Id. at 115. The Court concluded by saying that "Atlantic proves only that our decision in Halcyon was, and still is, good law on its

facts." Id. This interpretation of Halcyon and Atlantic was later reaffirmed in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 256 (1979), where the Court stated: "We . . . held that the shipowner could not circumvent the exclusive-remedy provision by obtaining contribution from the concurrent tortfeasor employer. Halcyon Lines . . . ." Id. at 261.

We note that our construction of § 905(a) is in accord with the most recent authoritative expressions of Congress. Senator Nickles, the chair of the Senate Labor Subcommittee and one of the managers of the 1984 Amendments to the Longshore Act, explained the conference committee's concerns to the Senate:

> The conferees were also concerned over the effect of the Supreme Court's decision in Lockheed Aircraft Corp. v. United States et al, -- U.S. --, which decided that the Federal

> Employees' Compensation Act did not bar third party claims for indemnification. Because section 5(a) of the Longshore Act contains nearly identical language to FECA, we considered an amendment to section 5(a). However, the plain meaning of the existing language indicates that there should be no third party liability. In addition, the clear congressional intent of the 1972 amendments to the act was to eliminate the problem of "circular suits" whereby employers paid workers compensation and then through suits by third parties became liable for additional amounts.

130 Cong. Rec. 11621 (daily ed. Sept. 20, 1984).

The Courts of Appeals, so far as we can determine, also have interpreted § 905(a) to bar contribution, and some forms of indemnity, from an LHWCA employer. See, e.g., Zapico v. Bucyrus-Erie Co., 579 F.2d 714-19 (2d Cir. 1978) (Friendly, J.); Watz v. Zapata Off-Shore Co., 431 F.2d 100, 120 (5th Cir. 1970); Horton & Horton, Inc. v. T/S J.E. Dyer, 428 F.2d 1131, 1133-34 (5th Cir. 1970);

see also American Mutual Liability Insurance Co. v. Matthews, 182 F.2d 322 (2d Cir. 1950); St. Julien v. Diamond M. Drilling, 403 F. Supp. 1256, 1259 (E.D. La. 1975). In these and other cases, frequently a distinction has been drawn between contractual (express or implied) indemnity, and noncontractual indemnity. Where indemnity is sought on the basis of an express or implied contract, the indemnity action has been held to proceed not "on account of injury," § 905(a), to the employee but because of the contract. See, e.g., Pippen v. Shell Oil Co., 661 F.2d 378, 386-88 (5th Cir. 1981); Zapico v. Bucyrus-Erie Co., 579 F.2d at 718, 721-22.

Here, defendants sue only for contribution and noncontractual indemnity. Based on the principles of Halcyon and Atlantic, as interpreted by Cooper Stevedoring and Edmonds, we rule

that the contribution claims against BIW in its capacity as employer are barred by the exclusive-remedy provision of the LHWCA, 33 U.S.C. § 905(a). As far as the noncontractual indemnity claims are concerned, the facts presented here compel us to characterize them as tort based contribution claims, see supra note 2. Accordingly, these claims are also barred by § 905(a).

Because the exclusivity provisions of both the Maine Act, § 4, and the federal LHWCA, § 905(a), bar these third-party claims against BIW qua employer, we have no need to reach the question whether the LHWCA preempts an inconsistent state exclusivity provision.

We have carefully considered defendants' other claims for relief and find them without merit. As far as the pro tanto claim is concerned, we note that the Maine Supreme Judicial Court has

very recently rejected defendants' position. See Diamond International Corp. v. Sullivan & Merit, Inc., No. Ken-84-358, slip op. (Me. June 6, 1985).

The judgment of the district court dismissing the third-party complaint is affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MILDRED V. DRAKE, Personal Representative of the Estate of Forrest Drake,	)	
Plaintiff	)	
v.	)	
RAYMARK INDUSTRIES, INC., et al.	)	CIVIL NO. 81-0228 P
Defendants	)	
v.	)	
BATH IRON WORKS CORPORATION,	)	
Third Party Defendant	)	

MEMORANDUM AND ORDER OF THE COURT GRANTING BATH IRON WORKS CORPORATION'S MOTION FOR SUMMARY JUDGMENT

Third-party defendant Bath Iron Works Corporation (BIW) has filed on July 23, 1984 a motion pursuant to Fed. R. Civ. P. 56 for summary judgment in its favor on all counts of the model third-party complaints filed against it by defendants in the above-entitle action. The record before the Court consists of the pleadings: four affidavits filed by BIW and a Notice of Wa er of Workers'

Compensation Lien filed by Commercial Union Insurance Company and BIW in support of the instant motion; the pleadings, affidavits, discovery and documents filed by BIW in support of a prior motion for summary judgment filed January 25, 1982 in the Bernier (78-98 P), Moore (78-55 P) and Jones (79-73 P) cases; and plaintiff Mildred V. Drake's answers to interrogatories of Johns-Manville Sales Corp. filed September 17, 1984 by Raymark Industries, Inc.

In its opinion and order dated July 5, 1984, the Court granted so much of BIW's motion for summary judgment, filed April 9, 1984, as sought dismissal of the claims for contribution and indemnity in defendants' model third-party complaint, but denied so much of that motion as sought dismissal of the claims for pro tanto relief in defendants' model

third-party complaint. See In re All Maine Asbestos Litigation (BIW Cases) (D. Me. July 5, 1984). See also Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313 (D. Me. 1981); Bernier v. Johns-Manville Sales Corp., Civ. No. 78-98 P (D. Me. Aug. 9, 1982); All Maine Asbestos Litigation (BIW Cases), Bench Ruling (D. Me. Mar. 9, 1984).

The record before the Court on the present motion discloses that neither Forrest Drake, his widow Mildred V. Drake, or his dependents have filed any claim for benefits under the Maine Workers' Compensation Act, 39 Me. Rev. Stat. Ann. § 1 et seq. The record further discloses that BIW's insurer has paid $15,471.07 in workers' compensation benefits under the Longshoremen's and harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 901 et seq., to Forrest Drake, his widow or dependents on claims

filed for the injury for which damages are sought in the present action, but that BIW has waived any right it may have to recover "any past, present or future Workers' Compensation lien that has arisen or may arise as a result of payments of workers' compensation benefits made to Forrest Drake, his widow, Mildred Drake, or his dependents." Because no benefits have been paid to Forrest Drake, his widow or his dependents under the Maine Workers' Compensation Act, and BIW and its insurer have waived any workers' compensation lien under the LHWCA, there is no predicate for the pro tanto relief sought by defendants against BIW in their third-party complaints. See generally 2A A. Larson, The Law of Workmen's Compensation §§ 75.22, 76.20, 76.33, 76.36 (1982); Note, Exceptions to the Exclusive Remedy Requirements of Workers'

Compensation Statutes, 96 Harv. L. Rev. 1641 (1983); Note, New Policies Bearing on Negligent Employer's Immunity From Loss Sharing, 29 U. Me. L. Rev. 243, 264-68 (1978). Summary judgment in BIW's favor can thus be entered dismissing the claims for contribution and indemnity in defendants' third-party complaints in this case. In re All Maine Asbestos Litigation (BIW Cases) (D. Me. July 5, 1984).

The pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, showing that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law, see Fed. R. Civ. P. 56(c), it is

ORDERED that BIW's motion for summary judgment in its favor on all counts of the third-party complaints filed by

defendants against BIW in the above-entitled action is GRANTED.

Dated at Portland, Maine this 30th day of October 1984.

United States District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-2033

MILDRED V. DRAKE,
Plaintiff, appellee,

v.

RAYMARK INDUSTRIES, INC., ET AL.,
Defendants and Third Party
Plaintiff-appellants.

No. 84-2034

MILDRED V. DRAKE,
Plaintiff, appellee,

v.

RAYMARK INDUSTRIES, INC., ET AL.,
Defendants and Third Party
Plaintiffs, appellees,

BATH IRON WORKS CORPORATION,
Third-Party Defendant, appellant.

Before

Campbell, Chief Judge

Coffin, Bownes, Breyer* and Torruella,
Circuit Judges.

ORDER OF COURT

Entered: October 22, 1985

The panel of judges that rendered the decision in these cases having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the suggestion for rehearing en banc be hereby denied.

By the Court,

Francis P. Scigliano

Clerk.

*Circuit Judge Stephen Breyer did not participate

[cc: Messrs. Furey and Hanson]

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MILDRED V. DRAKE	)	
	)	
Plaintiff	)	
v.	)	
	)	
RAYMARK INDUSTRIES, INC., et al.	)	CIVIL NO. 81-0228 P
	)	
Defendants	)	
v.	)	
	)	
BATH IRON WORKS CORPORATION,	)	
	)	
Third Party Defendant	)	

J U D G M E N T

In accordance with the Order for Final Judgment under Rule 54 (b), entered by Judge Gignoux On October 30, 1984, Judgment is hereby entered in favor of Bath Iron Works Corporation and against the defendants dismissing the third-party complaints filed by defendants against BIW in this action.

Clerk, U.S. District Court

Dated: November 1, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

MILDRED V. DRAKE, Personal Representative of the Estate of Forrest Drake, Plaintiff	:	CIVIL NO. 81-0228 P
v.	:	
RAYMARK INDUSTRIES, Inc., et al., Defendants	:	
v.	:	
BATH IRON WORKS CORPORATION, Third-Party Defendant	:	

ORDER FOR FINAL JUDGMENT UNDER RULE 54(b)

The Court having this date granted the motion of third-party defendant Bath Iron Works Corporation (BIW), filed July 23, 1984, for summary judgment in its favor on all counts of the third-party complaints filed by defendants against BIW in the above-entitled action, the Court now, pursuant to Fed. R. Civ. P.

54(b), expressly determines that there is no just reason to delay the entry of final judgment for BIW dismissing the third-party complaints filed against it by defendants in the above-entitled action.

It is therefore ORDERED that the Clerk of this Court is directed to enter final judgment in favor of Bath Iron Works Corporaton and against defendants DISMISSING the third-party complaints filed by defendants against BIW in the above-entitled action.

Dated at Portland, Maine, this 30th day of October 1984.

United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1779

IN RE:

ALL MAINE ASBESTOS LITIGATION (PNS CASES)

UNITED STATES OF AMERICA,
Petitioner.

Before

Campbell, Chief Judge,
Coffin, Bownes, Breyer* and Torruella,
Circuit Judges.

ORDER OF COURT

Entered: October 30, 1985

The petition for rehearing and rehearing en banc is denied.

Petitioner asserts that an analysis under Harville v. Johns-Manville Products Corp., 731 F.2d 775 (11th Cir. 1984), would indicate that its third-party claim bears a sufficient relationship to traditional maritime activity. It seeks

to distinguish the cases we cite on the ground that they have not involved a suit by a shipyard worker against a shipowner for failure to warn of dangers of asbestos on ships brought to a yard for repair.

We pass over the question whether the absence of an actual suit against BIW by plaintiff would itself defeat petitioner's third party claims. We proceed to what we deem the controlling Harville factor in our cases, whether the need for uniformity in maritime commerce mandates application of admiralty law. Although petitioners make a reasonable argument that a shipowner's duty to warn workers of dangers hidden on board should be governed by a uniform maritime law, we think the better approach is to see this as a situation appropriately left to state tort law. If Drake has sued BIW as pro hac vice vessel owner for failure to

warn or protect against a dangerous condition, the questions would have been whether working with asbestos was dangerous and whether BIW knew or should have known of it. These are the same questions that would arise if Drake had worked with asbestos, without warning or protection, on a ship now owned by BIW, or in one of BIW's warehouses on land. As the court in Harville noted, the issues that such litigation would have presented "are identical to those presented in countless other asbestos suits; they involve questions of tort law traditionally committed to local resolution." Harville, 731 F.2d at 786.

Petitioner notes on page 14 of the petition that the "Court on its own motion reviewed documents in the district court" and seems to suggest that this was beyond our scope of review. The only material that was forwarded to the clerk

of the court of appeals for review was the appendix. Because of the importance of the case, the court felt that it would be wise to examine the entire record. In order to do this, the record had to be obtained directly from the clerk of the district court in Portland, Maine. It is the custom of this court, in cases that require it, to examine the record in detail and not to rely entirely on the appendix.

By the Court,

Francis P. Scigliano

Clerk.

---

*Circuit Judge Stephen Breyer did not participate.

[cc: Messrs. Cox, Silberfeld, Furey and Fogarty]

APPENDIX E

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitutional Provisions

Article III, Constitution of the United States, Section 2

Jurisdiction

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; - to all Cases affecting Ambassadors, other public Ministers and Consuls; - to all Cases of admiralty and maritime Jurisdiction; - to Controversies to which the United States shall be a Party; - to Controversies between two or more States; - between a State and Citizens of another State; - between citizens of different States, - between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and

Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Statutory Provisions

5 U.S.C. § 8116(c) (1980)

(c) The liability of the United States or an instrumentality thereof under this subchapter or any extension thereof with respect to the injury or death of an employee is exclusive and instead of all other liability of the United States or the instrumentality to the employee, his legal representative, spouse, dependents, next of kin, and any other person otherwise entitled to recover damages from the United States or the instrumentality because of the injury or death in a direct judicial proceeding, in a civil action, or in admiralty, or by an administrative or judicial proceeding under a workmen's compensation statute or under a Federal tort liability statute. However, this subsection does not apply to a master or a member of a crew of a vessel.

33 U.S.C. § 902 (1978) (current version at 33 U.S.C. § 902 (1978 & Supp. 1985)).

Definitions

When used in this chapter -

(1) The term "person" means individual, partnership, corporation, or association.

. . . . .

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

. . . . .

(21) The term "vessel" means any vessel upon which or in connection with which any person entitled to

benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. § 905 (1978) (current version at 33 U.S.C. § 905 (Supp. 1985)).

Exclusiveness of liability

(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed by the vessel to provide ship building or repair services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing ship building or repair services to the vessel. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

46 U.S.C. § 740 (1978).

Extension of admiralty and maritime jurisdiction; libel in rem or in personam; exclusive remedy; waiting period

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water: Provided, That as to any suit against the United States for damage or injury done or consummated on land by a vessel on navigable waters, the Public Vessels Act or Suits in Admiralty Act, as appropriate, shall constitute the exclusive remedy for all causes of action arising after June 19, 1948, and for all causes of action where suit has not been hitherto filed under the Federal Tort Claims Act: Provided further, That no suit shall be filed against the United States until there shall have expired a period of six months after the claim has been presented in writing to the Federal agency owning or operating the vessel causing the injury or damage.

Me. Rev. Stat. Ann., Tit. 39, § 4

Applicability to certain actions and employers; exemptions

An employer who has secured the payment of compensation in conformity

with sections 21-A to 27 is exempt from civil actions, either at common law or under sections 141 to 148, Title 14, sections 101 to 8118, and Title 18-A, section 2-804, involving personal injuries sustained by an employee arising out of and in the course of his employment, or for death resulting from those injuries. This exemption from liability applies to all employees, supervisors, officers and directors of the employer for any personal injuries arising out of and in the course of employment, or for death resulting from those injuries. These exemptions also apply to occupational diseases sustained by an employee or for death resulting from those diseases.

Supreme Court, U.S.
FILED
MAR 22 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1246

IN THE

Supreme Court of the United States

October Term, 1985

MILDRED V. DRAKE

v.

RAYMARK INDUSTRIES, INC., et al.,
Petitioners

v.

BATH IRON WORKS CORPORATION,
Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Counsel for Respondent:
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12 pp

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QUESTIONS PRESENTED

I. DID THE LOWER COURT ERR IN HOLDING THAT CLAIMS BY SHIPYARD WORKERS FOR INJURIES CAUSED BY ASBESTOS EXPOSURE IN THE COURSE OF SHIPBUILDING AND SHIP REPAIR ARE NON-MARITIME, AND THEREFORE OUTSIDE THE SCOPE OF SECTION 905(b)?

II. DID THE LOWER COURT ERR IN HOLDING THAT THE IMMUNITY PROVIDED BY SECTION 905(a) AND SECTION 933 BARS CONTRIBUTION ACTIONS BROUGHT BY THIRD-PARTY TORTFEASORS AGAINST AN EMPLOYER UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT?

III. WHEN THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AND A STATE COMPENSATION ACT PROVIDE CONCURRENT COVERAGE FOR AN EMPLOYEE'S INJURY, SHOULD THE EMPLOYEE'S INITIAL ELECTION OF COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT CONTROL THE EMPLOYER'S LIABILITY TO THIRD-PARTY TORTFEASORS UNDER STATE LAW?

OPINIONS BELOW

Raymark reprints in it's Petition the decision of the First Circuit below and the District Court's Memorandum and Order from which appeal was taken. In granting summary judgment in Drake, the District Court incorporated the reasoning of two earlier decisions on issues significant to the Petition. In Bernier v. Johns Manville Sales Corp., 78-98 P(D.Me. August 9, 1982), the District Court held that Bath Iron Works Corporation (hereinafter "BIW") was not the owner or owner pro hac vice of the vessels at its shipyard upon which employees were exposed to asbestos. This Memorandum, Opinion and Order is reprinted as Appendix A. The District Court also held that section 4 of the Maine Workers Compensation Act (hereinafter "MWCA")

could bar contribution actions against BIW even if the employee initially filed a claim only under the LHWCA. See In re All Maine Asbestos Litigation (BIW cases) (D. Me., July 4, 1984) (reprinted as Appendix B). Raymark Petitions for Certiorari on this latter issue, but not on the question of vessel ownership.

STATEMENT OF CASE

The Respondent BIW adopts the Statement of the Case in the Petition with the exceptions and additions noted below.

A. FACTS

Many of the approximately 300 asbestos cases do not involve exposure solely while on vessels in navigable waters. Employees were exposed to asbestos on land and/or while working on

vessels in navigable waters. Forest Drake allegedly was exposed to asbestos in both places.

While neither Forest Drake nor his widow ever applied for or received benefits under the MWCA, BIW's status as an "assenting" employer meant that compensation benefits were available under that Act throughout the relevant period of time.

B. FIRST CIRCUIT DECISION

The First Circuit disposed of all claims against BIW by resolving two legal issues. First, the Court held that section 905(b) had no application to the asbestos cases because the Executive Jet requirement of a nexus to traditional maritime activity was not satisfied. According to the Court, the scope of section 905(b) is co-extensive with the

prevailing contours of maritime jurisdiction. Secondly, the Court concluded that section 905(a) barred contribution actions against employers. The Court rejected Raymark's contention that the decision in Lockheed v. United States, 460 U.S. 190 (1983) warranted a reversal of consistent Supreme Court and lower court decisions construing section 905(a) as a bar to contribution actions.

The First Circuit did not disturb the District Court's conclusions that BIW was not an owner or owner pro hac vice of vessels and that section 4 of the MWCA operated to bar contribution actions against BIW regardless of whether the employee in question initially filed a compensation case under the LHWCA or the MWCA.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I. THIS COURT SHOULD NOT ADDRESS THE INTERRELATIONSHIP OF MARITIME JURISDICTION AND SECTION 905(b) IN THIS CASE BECAUSE BIW'S STATUS AS NEITHER AN OWNER NOR OWNER PRO HAC VICE OF THE VESSELS MAKES RESOLUTION OF THE SECTION 905(b) ISSUE IRRELEVANT TO THE OUTCOME OF THIS CASE.

Raymark requests certiorari on only one of several interdependent prerequisites to liability under section 905(b). Raymark asserts that section 905(b) forms the necessary predicate for a contribution claim by giving BIW employees a direct cause of action against their employer under certain circumstances. Section 905(b) on its face addresses only claims by employees under the Act, not claims of third parties such as Raymark. Raymark's interest in section 905(b) flows from an understanding that a contribution claim

conceivably may exist against BIW if BIW employees possess a direct claim against their employer.

BIW cannot be held liable to its employees under section 905(b) unless all of the following propositions are true: (1) At material times, BIW was an owner pro hac vice of vessels under construction and repair at the shipyard; (2) the injuries to BIW employees caused by asbestos exposure are within general maritime jurisdiction; and (3) the injuries to BIW employees were not caused by "persons engaged in providing shipbuilding or repair services to the vessel" (33 U.S.C. §905(b)).

After a thorough review of the record, the District Court held that BIW was not an owner or owner pro hac vice because any control by BIW over the

vessels under construction and repair at its shipyard was merely incidental to construction and repair operations. Raymark does not seek review of this determination, but requests certiorari on another prerequisite to section 905(b) liability of absolutely no relevance unless BIW was an owner or owner pro hac vice of the vessels.

II. A CONFLICT AMONG THE CIRCUITS DOES NOT EXIST ON THE QUESTION OF WHETHER SECTION 905(b) APPLIES ONLY TO THOSE CLAIMS WITHIN THE ADMIRALTY JURISDICTION OF THE FEDERAL COURTS.

The Petition of Raymark cites several cases in support of the contention that the Circuit Courts of Appeal are in conflict on the issue of whether the test of Executive Jet Aviation Inc., v. City of Cleveland, 409 U.S. 249 (1972), applies to section

905(b) claims. With the possible exception of Hall v. Hvide Hull No.3, 746 F.2d 294 (5th Cir. 1984), cert. denied, 106 S. Ct. 69 (1985), none of those cases directly address the jurisdictional issue, particularly the interrelationship of section 905(b) and traditional maritime jurisdiction. In fact, the cases cited by Raymark as implicitly inconsistent with Drake involve distinct factual scenarios probably within the scope of maritime jurisdiction as delineated by Executive Jet.

In Stass v. American Commercial Lines Inc., 720 F.2d 879 (5th Cir. 1983) the employee fell through an open hatch when he slipped on soybeans left on the ship's deck. The employee in Kalogeros v. Brasileiro 446 F. Supp. 1975 (S.D.N.Y. 1978) alleged that he slipped on oily

stairs when descending to the engine room. The regular ship's crew was in charge of the vessel and engine room. The case of Savoy v. United States, 469 F. Supp. 301 (E.D. La. 1978) also involved an employee who fell while descending stairs. The employee claimed that the stairs were hazardous because of an excessive incline. The employee in DiLorenzo v. Robert E. Lee, Inc., 412 F. Supp. 1012 (E.D. La. 1976) asserted a claim based on the negligence of the vessel's captain in throwing fuel oil on the deck. In Harrelson v. United States, 420 F.Supp. 788 (S.D. Ga. 1976), affirmed 548 F.2d 353 (5th Cir. 1977), an employee testing cargo tanks for leaks was struck by an unidentified object allegedly left by the ship's crew on a set of grated stairs. The employee in

Hill v. Texaco Inc., 674 F.2d 447 (5th Cir. 1982) slipped and fell while inspecting a gasoline storage tank for rust. The barge owner in Allied Towing Corp. v. Tatem, 580 F.2d 702 (4th Cir. 1978) was negligent in carrying a grade of fuel for which it was not certified. The barge exploded when welders began repairs on a leak. Finally, the employee in McCarthy v. The Bark Peking, 716 F.2d 130 (2nd Cir. 1983) fell while painting the upper mainmast and spars of the vessel.

None of those cases involved a hazard comparable to asbestos exposure during the construction and major overhaul of vessels. The employees in those cases were faced with hazards normally associated with the use of vessels. On the other hand, the hazard

of inhaling asbestos dust is created during the construction or rip out of the vessels by the work of the shipbuilders themselves, and cannot be analogized to hazards in existence at the time the vessel is made available to others for unloading or repair. All of the authorities offered by Raymark as evidence of an intercircuit conflict involve factual situations arguably bringing the cases within the scope of maritime jurisdiction as defined by Executive Jet. None of the cases make express holdings contrary to the First Circuit decision in Drake and Raymark's observations regarding implicit holdings are wide of the mark.

The case law in the Fifth Circuit is not sufficiently settled to warrant the conclusion that a conflict exists between the Fifth and First Circuits.

The Fifth Circuit in Hall v. Hvide Hull, 746 F.2d 294, was forced to grapple with what it perceived as its own, prior inconsistent decisions. Compare Lundy v. Litton Systems Inc., 624 F.2d 590 (5th Cir.) cert. denied, 450 U.S. 913 (1981) with Lowe v. Ingalls Ship Building, 723 F.2d 1173 (5th Cir. 1984). See also Bynum v. Patterson Truck Lines Inc., 655 F.2d 643 (5th Cir. 1981); Russell v. Atlantic and Gulf Stevedores, 625 F.2d 71 (5th Cir. 1980); Parker v. South Louisiana Contractors Inc., 537 F.2d 113 (5th Cir. 1976). Analysis of these Fifth Circuit cases reveals three distinct issues: (1) whether a certain claim

satisfies the pre-Executive Jet test for maritime jurisdiction; (2) whether a certain claim satisfies the Executive Jet test of maritime jurisdiction; and (3) what tests should be employed in determining whether a claim is stated under section 905(b). The First Circuit in Drake held that the scope of section 905(b) was governed by the Executive Jet test and that maritime jurisdiction did not exist.

The issue of whether section 905(b) can provide an independent basis for federal question jurisdiction is related to the issue of whether a claim under section 905(b) must satisfy the Executive Jet test for maritime jurisdiction. The Fifth Circuit held unequivocally that section 905(b) did not create a federal statutory cause of action and therefore

could not form an independent basis for federal question jurisdiction. See Parker v. South Louisiana Contractors Inc., 537 F.2dd at 116-17; Bynum v. Patterson Truck Lines Inc., 655 F.2d at 644; Russell v. Atlantic and Gulf Stevedores, 625 F.2d at 72. The Court in Bynum explained that "federal jurisdiction of section 905(b) claims is based upon general maritime law, 28 U.S.C. section 1331(1), not independently upon Section 905(b) statutory recognition of the right to recovery. . ." Id. at 654. Section 905(b) is merely a restatement of the negligence claim already recognized under maritime law.

In Hall v. Hvide Hull, the Court maintained that Congress, in enacting section 905(b), intended to freeze in time the prevailing concepts of maritime

jurisdiction and incorporate them into the statute, thereby insulating section 905(b) from the evolving common law of maritime jurisdiction. By locking into pre-Executive Jet admiralty concepts, the Court in Hall apparently sanctioned the assertion of section 905(b) claims without requiring the satisfaction of prevailing rules of maritime jurisdiction. The severing of section 905(b) from the confines of present day maritime jurisdiction is the equivalent of establishing a new statutory claim capable of forming the basis for federal question jurisdiction, a result disavowed in Parker, Bynum and Russell. The Hall case also may conflict with other Fifth Circuit decisions interpreting the scope of general maritime jurisdiction. See Lowe v. Ingalls Ship Building, 723 F.2d

1173 (5th Cir. 1974); Hollister v. Luke Construction Co., 517 F.2d 920 (5th Cir. 1975).

The only confusion concerning the interrelationship of section 905(b) and the law of maritime jurisdiction is within conflicting Fifth Circuit decisions, not conflicting decisions among the circuits. Even the Fifth Circuit in Hall noted that the apparent inconsistency in its decisions presented an issue of "bancworthy dimension." 746 F.2d at 295. The Fifth Circuit, however, declined the Hall panel's invitation for en banc review. As this Court demonstrated in denying the petition for certiorari in Hall, review should not be granted on the section 905(b) issue solely because of a possible intracircuit conflict in the Fifth Circuit.

Neither should the Petition be granted because of an alleged deprivation of protection for workers. See Raymark Petition at 26-28. Confining the scope of section 905(b) to claims within general maritime jurisdiction does not deprive workers of remedies intended by Congress. A lack of a maritime claim is not the equivalent of no claim at all. If maritime law does not apply, owners or occupiers of property, including vessels under construction or major overhaul, are responsible for tortious conduct under state law. Raymark's motivation in apparently rallying for employee's rights springs from a need to overcome the employer immunity of section 905(a). That explains why Raymark is not content with the employees having state law negligence claims rather than maritime

claims. If the employer is a vessel owner, only the pre-1984 version of section 905(b) penetrates the employer immunity of section 905(a).

III. THE FIRST CIRCUIT CORRECTLY INTERPRETED AND APPLIED THE EXECUTIVE JET "NEXUS" REQUIREMENT.

Raymark misconstrues both Executive Jet and the First Circuit interpretation of that decision. Raymark avoids entirely an analysis of the nature of the employee's work and the cause of injury, preferring to latch onto generalities and labels. According to Raymark, maritime jurisdiction is satisfied per se with the simple allegation that the employee was injured by the negligence of a "vessel."

The scope of maritime jurisdiction depends upon the interaction of the federal need for uniformity in matters of

maritime commerce and navigation and a due regard for the independence and jurisdiction of state governments. Although Raymark recognizes the need for uniformity as a key variable, no attempt is made in the Petition to articulate a federal interest in a uniform tort law applicable to cases of asbestos exposure. Raymark notes that "the duties of the vessel owner . . ., whose activities take him from port to port, historically have been the sole province of the maritime law. . . ." Raymark Petition at 33. Unlike most legal issues arising out of the activities of a vessel, ship construction and major overhaul do not take a vessel owner "from port to port." Significantly, BIW's alleged status as an owner pro hac vice springs solely from the "control" exercised by BIW incidental

to its ship building and overhaul operations. Since none of BIW's activities, even those as an alleged vessel owner, take it from "port to port," state law is as capable as federal law of treating BIW uniformly in all its activities.

The federal need for uniformity applies to matters of maritime navigation and commerce, matters arising from the use of a vessel as a vessel. As explained by this Court in Executive Jet:

> The law of admiralty has evolved over many centuries, designed and molded to handle problems of vessels relegated to ply the waterways of the world, beyond whose shores they cannot go. That law deals with navigational laws --- rules that govern the manner and direction those vessels may rightly move upon the waters. When a collision occurs or a ship founders at sea, the law of admiralty looks to those rules to determine fault, liability and all other

> questions that may arise from such a catastrophe. Through long experience, the law of the sea knows how to determine whether a particular ship is seaworthy, and it knows the nature of maintenance and cure. It is concerned with maritime liens, the general average, captures and prizes, limitation of liability, cargo damage and claims of salvage.

409 U.S. at 269-70. The construction or major overhaul of a vessel is a stationary, long term project. Maritime commerce and navigation are not negatively affected by a lack of uniformity flowing from the application of state tort law to claims for exposure to asbestos during construction and major overhaul of vessels. The law of the sea can claim no expertise on legal and factual matters related to claims of exposure to asbestos in the work place.

The asbestos manufacturers have fought successfully against the invocation of admiralty jurisdiction in the claims against them, yet simultaneously argue that admiralty jurisdiction applies to claims employees allegedly have against BIW. See Austin v. Unarco Industries, Inc., 705 F.2d 1 (1st Cir.), cert dismissed, 463 U.S. 1247 (1983). Raymark professes to "see no hint of inconsistency in its position." Raymark Petition at 34. The First Circuit in Austin summarized and adopted the argument of the asbestos manufacturers on the jurisdictional question:

> It argues, however, that the decedent's work was not significantly related to traditional maritime activity involving navigation and commerce, as required by the Court in Executive Jet; that injuries to shipyard workers are not a traditional concern

> of admiralty; and that the policy justifications for a uniform maritime law do not support admiralty jurisdiction in this case. After much reflection, we agree.

705 F.2d at 10-11. Raymark offers to this Court the exact opposite: that Drake's work was significantly related to traditional maritime activity involving navigation and commerce; that injuries to shipyard workers are a traditional concern of admiralty law; and that the policy justifications for a uniform maritime law do support admiralty jurisdiction. The absence of admiralty jurisdiction in Austin was not the result of Raymark's status as a manufacturer as opposed to a shipyard, but rather the result of a determination that "the hazards faced by a shipyard worker

installing asbestos are scarcely traditional concerns of admiralty . . ." 705 F.2d at 12-13.

The First Circuit's decision in Drake does not "constitute a dangerous and unwarranted erosion of the admiralty jurisdiction . . ." Raymark Petition at 34. In so characterizing the Drake decision, Raymark completely ignores the Court's emphasis on the employee's job activities and circumstances surrounding the injury. No reasonable reading of the Drake opinion supports Raymark's observation that the First Circuit held that "whether a vessel poses an unreasonable danger to those legitimately on board is better left to state tort law." Petition at 34. The First Circuit unquestionably would find admiralty jurisdiction in a wide range of cases

involving injury to those on board vessels caused by vessel owner negligence. Those exposed to the work-place hazard of asbestos during ship construction and major overhaul are appropriately excluded from that group.

IV. THIS COURT SHOULD NOT ADDRESS AT THIS TIME THE QUESTION OF WHETHER SECTION 905(a) BARS CONTRIBUTION ACTIONS AGAINST EMPLOYERS BECAUSE NO CONFLICT EXISTS AMONG THE CIRCUITS AND THE FIRST CIRCUIT'S DECISION IS CONSISTENT WITH SUPREME COURT CASES INTERPRETING THE LHWCA.

A. The case of Lockheed Aircraft Corp., v. United States, 460 U.S. 190 (1983), does not suggest or compel an interpretation of section 905(a) contrary to the First Circuit's decision in Drake.

Raymark's attack on section 905(a) rests solely upon the Supreme Court decision in Lockheed Aircraft Corp. v. United States, 460 U.S. 190 (1983). The Court in Lockheed permitted an indemnity action against the United States despite

the exclusive liability provision at 5 U.S.C. §8116(c). The Court held "only that FECA's exclusive liability provision, 5 U.S.C. §8116(c), does not directly bar a third-party indemnity action against the United States." Id. at 199.

The Lockheed decision has little or no persuasive value in the LHWCA context for two major reasons: (1) the Lockheed Court relied upon Weyerhaeuser SS Co., v. United States, 372 U.S. 597 (1963), a decision with no counterpart in the LHWCA, and (2) the Congressional silence on the immunity issue in the FECA context is in sharp contrast to the substantial leglislative history of the 1972 and 1984 LHWCA amendments.

The Court's conclusions in Lockheed regarding congressional intent do not apply to the LHWCA. The Lockheed Court noted that "in the 20 years since Weyerhaeuser was decided, Congress has not modified FECA's exclusive-liability provision to include third parties." Id. at 196. This congressional inactivity was considered "particularly significant in view of the 1966 codification of FECA which included amendments to the new section 8116 (c)." Id. 196.

The same aid to construction utilized by the Court in Lockheed, when applied to the interaction of case law and congressional activity under the LHWCA, mandates the conclusion that section 905(a) prevents contribution actions against employers. Not only has Congress been content to leave the rule

of no contribution intact, Congress has amended the LHWCA to close whatever loopholes have arisen in the employer's exclusive liability under the Act. Hence, utilization of the Lockheed Court's construction principles for discovering legislative intent generates a stronger case for disallowing contribution under the LHWCA than for allowing contribution under FECA.

In Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282 (1951), the Court prohibited contribution against an employer under the LHWCA. The Court in Cooper Stevedoring Inc., v. Fritz Kopke Inc., 417 U.S. 106 (1974), devoted the majority of its opinion to an anaysis of Halcyon Lines in an effort to resolve the issue of whether contribution between joint tortfeasors exists in

maritime actions for personal injuries. The Cooper Court held that maritime law recognizes contribution between joint tortfeasors and that "our decision in Halycon was, and still is, good law on its own facts." Id. at 115. The only fact differentiating Halycon from Cooper was that the contribution defendant in Halycon was an employer protected by the LHWCA. One who maintains that Halycon Lines does not stand for the proposition that section 905(a) bars contribution actions against employers must explain the meaning of Halycon in the post-Cooper era. The Court in Edmonds v. Compagnie Generale Transatlantique, 443 U.S. 255, 261 (1975) cited Halycon Lines for the proposition that "the ship owner could

not circumvent the exclusive-remedy provision by obtaining contribution from the concurrent tortfeasor employer."

A review of the legislative history of the 1972 amendments to the LHWCA and pre-1972 case law leaves no doubt that Congress intended section 905(a) to bar standard contribution actions against employers. The 1972 amendments to the LHWCA were primarily a response to a series of Supreme Court decisions through the 1940's and the 1950's that effectively circumvented the exclusive liability provisions of section 905. See Seas Shipping Co., v. Sieracki, 328 U.S. 85 (1946); Ryan Stevedoring Co., v. Pan-Atlantic S.S. Corp. 350 U.S. 120 (1956). Although Ryan and Sieracki produced a system in which stevedores effectively lost their immunity from suit whenever a

longshoreman sued a vessel owner for unseaworthiness, during this same pre-1972 period section 905 was consistently interpreted to preclude contribution actions against employers. See, e.g., Murray v. United States, 405 F.2d 1361, 1364 (D.C. Cir. 1968); Simpson Timber Co., v. Partes, 390 F.2d 353 (9th Cir. 1968), cert. denied, 393 U.S. 858. Ocean Drilling and Exploration Co., v. Berry Brothers Oil Field Service, 377 F.2d 511 (5th Cir. 1967), cert. denied, 389 U.S. 849; Brown v. American-Hawaiian S.S. Co., 211 F.2d 16 (3rd Cir., 954); American Mutual Liability Insurance Co., v. Matthews, 182 F.2d 322 (2nd Cir. 1950); The prevailing if not universal approach prior to the 1972 amendments was to prohibit contribution because of the employer immunity provided by section

905, regardless of whether the contribution-plaintiff was a vessel-owner. In fact, the largest block of employees covered by the LHWCA prior to 1972 were private employees in the District of Columbia. The LHWCA had served as the compensation act for private employees in the District of Columbia since 1928. See 36 D.C. Code §501 (1973), repealed by D.C. Law 3-77, 27 D.C. Reg. 2503 (1980). The District of Columbia cases before 1972 consistently held that section 905 barred contribution actions against employers under the Act. See Coates v. Potomac Electric Power Co., 95 F.Supp. 779 (D.D.C. 1951); Baird v. John McShane Inc., 108 F.Supp. 553 (D.D.C. 1952).

Congress was cognizant of this universal judicial interpretation of section 905(a) at the time of the 1972 amendments. Congress in 1972 not only refrained from altering this consensus, but also added specific language to section 905 for the express purpose of eliminating the exception to employer immunity that the Supreme Court had developed in the Sieracki/Ryan line of cases.

The policy reasons behind the 1972 amendments apply to contribution actions in general. Congress specifically noted the importance of diverting resources from legal expenses to greater compensation benefits. The gradual liberalization of tort law and the landward extension of the LHWCA in 1972 substantially increased the potential for

employee third party suits against tortfeasors other than vessel owners, and correspondingly increased the volume of possible contribution claims against employers. Allowing standard contribution actions in all such cases in which the employer is potentially negligent unquestionably thwarts the objective of Congress in enacting the 1972 amendments. Lockheed has not been a source of confusion to Congress as alleged by Raymark. Senator Nichols explained that no amendment was made to section 905 (a) because "the plain meaning of the existing language indicated that there should be no third-party liability." Cong. Rec. S11621 (Sept. 20, 1984). Senator Nichols noted that the 1972 amendments were for the purpose of eliminating the problem of

circular suits whereby employers would pay workers' compensation and then become liable for additional amounts to third parties. Id. Although Senator Hatch noted that the 1984 legislation did not specifically address the impact of Lockheed, Senator Hatch explained that he personally doubted whether Lockheed posed a serious threat to longshore employers because "the Courts have long recognized that a longshore employer whose concurring negligence contributed to an employees injury cannot be sued as a joint tortfeasor by the third party seeking contribution." Cong. Rec. S11623 (Sept. 20, 1984). Finally, the Senate report on the legislation eventually passed as the 1984 amendments stated

unambiguously that vessel owner liability of shipyards should be eliminated because

> the LHWCA should adhere closely to the principle that an employer should be responsible for worker's compensation exclusive of any other recovery against the employer . . .

S. Rep. No. 98-81 at 31 (98th Cong. 1st Sess.).

As demonstrated above, the legislative history and judicial interpretation of the LHWCA is completely distinct from FECA. While those acts may be similar in language and in origin, they have taken completely different paths since their inception. The decision in Lockheed does not render appropriate a complete reversal of everything that Congress and the courts have done to protect employers under the LHWCA over the last thirty-five years.

B. Maine law does not recognize an equitable right of contribution when the exercise of that right would frustrate the public policies at the foundation of both section 4 or section 905(a).

Raymark criticizes the First Circuit's conclusion that section 905(a) bars contribution actions against employers. As noted in Lockheed, the question of whether or not an employer may be liable for contribution to third-party tortfeasors involves an assessment of the applicable immunity provision and the law of contribution. The parties in Lockheed stipulated that a valid tort indemnity claim existed against the United States. Maine law, however, does not recognize an equitable right of contribution when the equities either are not present or are outweighed by other policy considerations.

An immunity provision such as section 905(a) can operate to bar contribution on three distinct grounds: (1) the employer's direct immunity from suit by employees eliminates the joint or common liability necessary to contribution actions; (2) either the express language of the immunity provision or clear legislative intent bars contribution actions by third-parties; or (3) allowing contribution would dilute the protection afforded employers from direct suit and the policy reasons behind the basic trade-off in the compensation act outweigh the policies in favor of contribution. Although many courts tend to rely upon either the first or second grounds for denying contribution, section 905(a) should be interpreted as a bar to contribution

actions under Maine law on the third basis without regard to the applicability of other grounds. Significantly, section 4 of the MWCA bars contribution actions because of the underlying public policy and not because of a literal interpretation of the express language of section 4 or the absence of "common liability".

In barring contribution actions against employers, the Maine Supreme Judicial Court concluded that the policies in support of contribution are weaker than the policies behind the employer immunity from direct suit:

> We rule that the Legislature, in imposing absolute liability on an assenting employer without reference to fault in return for the employee's speedy recovery of fixed but limited benefits for any industrial injury, has established a comprehensive scheme for the distribution of loss by industrial accidents to the ultimate benefit of the employer, employee and the

> public at large. Under such circumstances, for this Court to shift part of the third-party tortfeasor's liability onto the assenting employer merely on the basis of the equitable doctrine that parties whose concurrent negligence has caused an injury should bear a like burden in redressing the same, would tend to frustrate pro tanto the purposes of the Act. . . . This statutory policy providing the employer with a definitive liability for payment of benefits predictable with some degree of accuracy in all industrial accidents and resting upon the employer's immunity from further damages beyond the call of the compensation act transcends any counteracting judicial considerations of equitable principles.

Roberts v. American Chain & Cable Co, 259 A.2d 43,49-50 (Me. 1969). Since contribution in Maine is based upon equitable principles and the equities do not warrant frustration of the purposes of the MWCA, the right of contribution does not exist against assenting employers under the MWCA. Whether the same result obtains under the LHWCA

depends upon a comparison of the policy reasons behind section 905(a) and section 4.

The strength of the policies favoring contribution in Maine is not enhanced merely because the immunity relied upon derives from section 905(a) rather than section 4. The right to contribution under Maine law cannot overcome section 905(a) for the same reasons it could not overcome section 4. The LHWCA and MWCA both impose absolute liability on an assenting employer without reference to fault in return for established benefits. The essence of the employer's quid pro quo is "absolute but limited and determinate liability." Id at 49. Holding an assenting employer answerable in contribution "would tend to frustrate pro tanto" the purposes of the

LHWCA to the same extent as the MWCA. If Maine assigns greater significance to the public policy underlying the MWCA than to its own right of contribution, federal courts should not hesitate to elevate the policies underlying section 905(a) above that same right of contribution. As demonstrated above, the absence of contribution against MWCA employers flows not from the technical common liability rule or express statutory language, but rather from the weight of the policies supporting section 4, the very same policies at the foundation of section 905(a).

V. THE ISSUE OF WHAT EMPLOYER IMMUNITY PROVISIONS APPLY IN CASES WITHIN THE CONCURRENT COVERAGE OF THE LHWCA AND A STATE COMPENSATION ACT DOES NOT POSE A SUBSTANTIAL FEDERAL QUESTION WORTHY OF SUPREME COURT REVIEW.

Since the asbestos cases involve the concurrent coverage of the LHWCA and the MWCA, the employer immunity provided by Maine compensation law bars contribution actions against BIW regardless of the interpretation given to section 905(a) of the LHWCA. Section 4 of the MWCA prohibits non-contractual actions for contribution or indemnity against assenting employers under the Act. See McKellar v. Clark Equipment Co., 472 A.2d 411,416 (Me. 1984). Despite the concurrent coverage of the state and federal compensation acts, Raymark maintains that an employee's election of benefits under the LHWCA precludes utilization of the employer immunity provision of a state act for the purpose of barring contribution actions. That proposition is inconsistent with

generally accepted principles of worker's compensation law. Raymark finds the invocation of Section 4 of the MWCA "troublesome" because Drake did not apply for or receive MWCA benefits. BIW, however, was an assenting employer under the MWCA as well as the LHWCA. As with all compensation acts, the immunity provided by section 4 is not triggered by a particular employee's decision to pursue compensation benefits: See 2 A. Larson, The Law of Workmen's Compensation §65.14 at 12-9 (1983). Just as section 4 protects the employer regardless of whether a compensation claim is filed at all, that protection does not evaporate simply because the employee seeks compensation under the LHWCA.

Raymark remarkably asserts that the application of section 4 in the Drake case violates the quid pro quo at the foundation of compensation acts. As explained above, the employer immunity does not depend upon the filing of a compensation claim. For example, a covered employee under the LHWCA who voluntarily foregoes his compensation remedy has no right to bring a direct tort action against his employer. Consistency requires Raymark to take the untenable position that any covered employee who voluntarily decides not to file a compensation claim for a covered injury has thereby lost his quid pro quo and therefore may recover in tort against his employer. Since Drake or his widow could have brought a compensation claim

under the MWCA, BIW may avail itself of the protection from suit afforded by that Act.

The approach advocated by Raymark requires an interpretation of the 1972 Amendments exactly opposite of that intended by Congress. In 1972, Congress eliminated every form of contribution action against employers that had been recognized by the Courts up to that point in time. As noted by Raymark, the 1972 Amendments also expanded coverage of the LHWCA shoreward to create a "broad zone of concurrent jurisdiction." Raymark Petition at 42. A vast number of compensation cases previously covered only by the state act are now covered by both state and federal compensation acts. In every case covered by only the state act prior to 1972, BIW was entitled to

full immunity from contribution claims by third-party tortfeasors. According to Raymark, the 1972 Amendments effectively overruled this state law protection of employers in every case within the zone of concurrent coverage in which the employee initially elects compensation under the federal act. When analyzed in conjunction with the landward extension of the LHWCA, Raymark's proposal that an employee's compensation election control third-party contribution rights recasts the 1972 Amendments as a vitiator of employer immunity, a remarkable feat of transformation for legislation designed to eliminate claims against employers and channel resources to compensation benefits.

VI. NO CONFLICT AMONG THE CIRCUITS EXISTS ON THE QUESTION OF WHAT EMPLOYER IMMUNITY PROVISION APPLIES IN CASES WITHIN THE CONCURRENT COVERAGE OF THE LHWCA AND A STATE COMPENSATION ACT.

Contrary to Raymark's assertions, no conflict exists among the Circuits on this issue. The Fifth Circuit in Jenkins v. McDermot Inc., 734 F.2d 229 (5th Cir. 1984) addressed an entirely different issue. The employee of a subcontractor was injured by the negligence of a general contractor under circumstances giving rise to the concurrent coverage of the Louisiana Compensation Act and the LHWCA. The Louisiana Act would have provided immunity to the non-employer, general contractor, whereas the the LHWCA protected only the actual employer. The employee sought compensation benefits under the LHWCA. The Court held that the employee could sue the general contractor because he elected federal benefits.

A key distinction exists between Jenkins and Drake. The issue in Jenkins was the recovery rights of the employee. The issue in Drake is the contribution rights of a third party against an employer. As concerns limitations on the recovery rights of an employee, the employee's election of one compensation act or another plays a legitimate role. Raymark, however, attempts to assign significance to the election of the employee even though the issue allegedly dependent upon the election, that is the employer's liability to third-parties, has absolutely nothing to do with the benefits or recovery available to the employee. Section 933 of the LHWCA expressly preserves an employee's claims against non-employer third parties. Once the employee elects federal benefits,

thereby obtaining' the rights provided by section 933, state law provisions directly contrary to section 933 are preempted. Not a single aspect of the Jenkins decision conflicts with the First Circuit's decision in Drake.

CONCLUSION

For the foregoing reasons, BIW respectfully submits that this Court should deny Raymark's Petition for A Writ of Certiorari to review any aspect of the decision of the Court of Appeals.

Respectfully submitted,

NORMAN & HANSON

Robert F. Hanson

James D. Poliquin
Attorneys for Respondent
Bath Iron Works Corp.

CERTIFICATE OF SERVICE

I, James D. Poliquin, Esq., certify that on or before the 22nd day of March, 1986, I mailed, postage prepaid, forty (40) copies of the Respondent's Brief In Opposition to the Petition for Writ of Certiorari to the Clerk of the Supreme Court of the United States, One First Street N.E., Washington, D.C. 20543, and mailed three (3) copies to Benjamin Thompson, Esq., Thompson, McNaboe & Ashley, P.O. Box 447, Portland, ME 04112, counsel for Petitioner, Raymark Industries, Inc., and mailed three (3) copies, postage prepaid, to Peter J. Rubin, Esq., Bernstein, Shur, Sawyer & Nelson, One Monument Square, Portland, Maine 04101, counsel for Owens-Illinois, Inc., Celotex Corporation, Pittsburgh

Corning Corporation, H. K. Porter Company, Inc. Southern Textile Corporation, Inc., Keene Building Products corporation and Owens-Corning Fiberglas Corporation.

James D. Poliquin

STATE OF MAINE
CUMBERLAND, ss.

Personally appeared the above-named James D. Poliquin, who subscribed and swore to this instrument this 20th day of March, 1986.

Before me,

Notary Public

NATHALIE M. BERRY
NOTARY PUBLIC, MAINE
MY COMMISSION EXPIRES OCTOBER 3, 1986

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

Civil No. 78-98 P

ROLAND J. BERNIER and DESNEIGE L. BERNIER, Plaintiffs
v.
JOHNS-MANSVILLE SALES CORP., et al., Defendants
ELLIS M. MOORE and CELIA MOORE, Plaintiffs
Civil Nos. 79-55 P and 831-0045P (Consolidated)
RAYMOND E. JONES and FRANCES JONES, Plaintiffs
v.
Civil No. 79-73 P
JOHNS-MANVILLE SALES CORP., et al., Defendants
RAYBESTOS-MANHATTAN, INC., Defendant and Third-Party Plaintiff,
v.
BATH IRON WORKS CORPORATION Third-Party Defendant

MEMORANDUM OF OPINION AND ORDER OF THE COURT

GIGNOUX, C.J.

Plaintiffs in these three actions have brought suit against various manufacturers and supplers of asbestos-containing products for injuries allegedly sustained from exposure to their products while employed at Bath Iron Works (BIW), a privately-owned shipyard in Bath, Maine. Plaintiffs seek recovery of compensatory and punitive damages on theories of negligence, breach of warranty, and strict liability. Jurisdiction is predicated on diversity of citizenship. 28 U.S.C §1332(a).

One of the defendants, Raybestos-Manhattan, Inc. (R-M), has filed in each action a third-party complaint against BIW seeking contribution and indemnity. Presently before the Court is a motion

for summary judgment filed by BIW pursuant to Fed. R. Civ. P. 56, in support of which BIW asserts that the third-party action is barred by the exclusive liability provision of Section 905(a), 33 U.S.C. §905(a), of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §901 et seq.[1] The record consists of the pleadings, affidavits, answers to interrogatories, deposition excerpts, and admissions on file.

Each of the third-party complaints, which are identical, contains six counts. The theories of recovery against BIW asserted by R-M in the first five counts have previously been rejected by this

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[1]It is undisputed that the plaintiff employees were covered by LHWCA and have received workers compensation benefits under the Act.

Court. See Austin v. Johns-Manville Sales Corporation, 508 F. Supp. 313 (D. Me. 1981). Undaunted by the Court's prior ruling, R-M in Count VI of the present third-party complaint seeks contribution and indemnity by BIW on the theory that BIW was the owner pro hac vice of the vessels under construction or undergoing repair in its yard on which plaintiffs worked, and is therefore subject to liability for negligence under Section 905(b) of the LWHCA, 33 U.S.C. §905(b).

For the reasons to be stated, the Court has concluded that BIW was not during the relevant periods the owner pro hac vice of vessels being constructed or repaired in its yard and that the cause of action asserted in Count VI of R-M's third-party complaints is therefore

barred by Section 905(a) of the LHWCA[2]. BIW's motion for summary judgment is therefore granted.

I.

The Facts

The record presently before the Court discloses that plaintiff Roland Bernier, now deceased, worked for BIW as a boiler assembler from 1942 to 1945; plaintiff Ellis Moore worked as a pipe coverer from 1955 to the present time. The record does not indicate specifically on which vessels these employees worked. Generally, during the period of their employment, however, BIW constructed new vessels and repaired or overhauled

[2]In light of the Court's determination that BIW was not an owner pro hac vice of the vessels upon which the plaintiff employees may have worked, it is unnecessary to consider the other grounds asserted by BIW in support of its summary judgment motion.

additional vessels for the United States Navy and for commercial shipowners. The record shows the following with respect to the control assumed by BIW over vessels being constructed or overhauled in its yard.

A. U.S. Navy Vessels

When BIW undertakes to construct or overhaul a ship for the U.S. Navy, the parties enter into a detailed contract which sets forth procedures and schedules to be followed during all phases of the work, and which defines the rights and duties of both parties. Generally, the contracts provide that BIW is responsible for adopting and enforcing adequate health and safety regulations (at a minium meeting OSHA regulations) and that Navy personnel have access to the vessels

undergoing construction or repair.[3] BIW does not hold legal title to any newly constructed or overhauled naval vessel at is facility.[4]

To oversee and administer the contract, the Navy maintains a permanent office at BIW. The Supervisor of Shipbuilding with a staff of over 200 closely monitors the work under the contracts. The Supervisor may unilaterally order changes in the

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[3] See R-M Exhibit E at art. 17, 20; Exhibit J. at art. J-38, J-42. A 1948 contract to construct an experimental Motor Torpedo Boat also required BIW to purchase collision insurance to cover operation of the vessel during the test runs. See R-M Exhibit K at art. 14. This requirement has not appeared, however, in more recent construction or repair contracts.

[4] Affidavit of William F. Mussenden, ¶¶ 3, 4, 5.

contracts, or stop work.[5] Any movement of the ships at the yard requires advance notification and approval of the Supervisor.[6] The Supervisor and his staff inspect work regularly; attend all tests performed pursuant to the contracts; determine whether and when trial runs of the vessels will take place; and closely monitor the trial runs.[7] The Supervisor also acts as squadron commander of all ships in the yard.

1. New Construction

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[5] See Supplemental Affidavit of William F. Mussenden, ¶¶ 2, 3.

[6] See Affidavit of William Rich, ¶6.

[7] See Affidavit of William Rich, ¶¶ 6-10, 13-16; Third-Party Defendant's Exhibit C, at 2002-09.

Construction of a new vessel begins in the BIW yard with fabrication of the hull, laying of the keel, and installation of the propulsion machinery.[8] When the hull is launched, the various combat and operation systems are installed.[9] BIW workcrews are, of course, in control of the launched hull while work is in progress. Navy personnel, however, have unlimited access and closely supervise the progress of the work. Asbestos insulation is done after the hull is launched.[10]

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[8] See Third-Party Plaintiffs' Exhibit J, at art. J-49.

[9] Id.; Deposition of John R. Newell, at 54-55.

[10] Deposition of John R. Newell, at 54-55.

If any ship must be moved from berth to berth within the yard during the course of construciton, BIW must notify the Supervisor and obtain his permission. Tugs hired by BIW, sometimes assisted by a small BIW boat, do the principal moving.[11]

Subsequent phases of construction specified in the contract call for testing of the vessel, which requires that it be operated. Two types of builder's trials are performed: "dock" trials and "sea" trials.

Dock trials involve testing the ship's systems while it is secured to the dock. BIW draws up a proposed agenda and submits it to the Supervisor for his approval. The proposed agenda outlines in detail the specific tests to be

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[11]Deposition of John R. Newell, at 59.

performed, and the manner and schedule of implementation.[12] The Supervisor reviews the proposed agenda, determines whether a dock trial is appropriate at that time, and then makes any modifications in the proposed agenda deemed necessary.[13] BIW personnel conduct the trial in strict accordance with the final agenda while the Supervisor's representatives closely monitor the trial.

Sea trials involve taking the new vessel to sea for several days to detemrine whether the contract specifications have been met. Again, BIW draws up a proposed trial agenda and submits it to the Supervisor for comment

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[12] Affidavit of Cecil Fullerton, ¶¶ 7, 8.

[13] Id.

and approval.[14] These agenda schedule in minute detail the tests to be performed as well as all vessel manuevers.[15] BIW employees drawn from the various departments comprise the vessel's crew, and BIW's yard captain, William Rich serves as the captain. The Supervisor reviews and approves the crew list. Although the BIW captain and crew actually operate the vessel during a trial, they follow strictly the schedule of the agenda which even prescribes the order of firing engines and vessel speed.[16] The Navy representatives aboard

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[14] Affidavit of William Rich, ¶¶9, 10; Affidavit of Cecil Fullerton, ¶¶7, 8.

[15] Affidavit of William Rich, at appendix B and C.

[16] See Affidavit of William Rich, at ¶16, appendix B and C.

the vessel during these trials have authority to modify a trial in progress, and even to terminate a trial.

Upon successful completion of the builder's trials, the contracts call for a "preliminary acceptance" trial. This trial essentially repeats the sea trial and serves as the final trial run before delivery of the vessel to the Navy. BIW submits a proposed trial agenda to both the Supervisor and to the Navy Board of Inspection and Survey (INSURV) in advance of the trial. INSURV determines whether a trial is appropriate; makes desired modifications in the agenda; and finally approves the trial.[17] As with the earlier sea trial, BIW submits for approval a list of crew members. Representatives of the Supervisor and

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[17] See Affidavit of Cecil Fullerton, ¶ 9.

INSURV monitor operation of the ship, and have authority to modify or terminate the trial.

Delivery is the final stage of BIW responsibility under a contract. Although at the present time, the Navy accepts vessels at BIW's facility, prior to 1969 BIW delivered the vessels to the Boston Naval Shipyard. Again, approved BIW employees comprised the crew and Rich was the captain; representatives of the Supervisor and other naval personnel, including some of the vessel's prospective officers were aboard during the trips to Boston.[18]

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[18]The record also indicates that prior to its acquisition of drydock facilities in 1980 BIW subcontracted sub-waterline painting work to other shipyards along the East coast. Trips to these facilities were conducted in the same manner as the sea trials discussed above. Permission to make the trip was secured in advance from the Supervisor. Rich was

2. Repair and Overhaul

Navy ships that are brought to Bath for repair and overhaul fall into one of two categories. Some vessels remain commissioned during the repair period. The officers and crew of these vessels stay with the ship during the period. The Navy crew controls access to the ship and is responsible for security. Regular watches are maintained, as are the ship logs. The Navy crew mans the vessel during all trials, and may assist in some of the repair work. R-M concedes that BIW is not the owner pro hac vice of Navy vessels which remain commissioned.

(footnote continued from previous page) the captain; approved BIW employees were the crew; Supervisor personnel attended and tested the ship's systems. Navy representatives approved of the drydock facilities before docking. See Affidavit of William Rich, at ¶ 19.

Vessels which require more extensive overhaul customarily are "decommissioned" shortly after arrival at the yard. When the vessels arrive, they are delivered over to the custody of the Navy Supervisor. The crew is gradually dismissed in phases and reassigned to duty on other ships. The logs are removed. When the contract work is ready to proceed, the Supervisor turns the vessel over to BIW in accordance with the contract. Six months before completion of the contract work, a nucleus crew of officers returns to the shipyard; one month before completion, a skeleton enlisted crew arrives. The ship is recommissioned after completion of the contract work and delivery to the Navy.

The contracts require BIW make adequate provisions for security and for the health and safety of workers during the repair period, and that Navy personnel at all times have access to vessels undergoing repair. Once the overhaul and repair work nears the appropriate stage, the same dock, sea and preliminary acceptance trials described above with respect to newly constructed vessels are performed on the overhauled vessels.

B. Commercial Vessels

The procedure for construction and overhaul of commercial vessels parallels closely that for naval vessels. BIW negotiates a contract with the owner that prescribes in similar detail the work to be done, the manner in which it is to be done, and the schedule for completing the

various stages of the work. The owner maintains a representative at the shipyard during all phases of the contract work. This so-called owner's representative and his assistants monitor BIW's performance under the contract in the same manner that the Navy Supervisor and his staff monitor Navy Contracts.[19] When required to move vessels in the yard from berth to berth, BIW notifies and obtains permisssion from the owner's representative.[20]

Dock and sea trials are conducted in the same manner for newly constructed commercial vessels as for naval vessels.[21] Rich is the captain; BIW

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[19]Affidavit of William Rich, ¶ 22.

[20]Id. at ¶ 23.

[21]Sea trials were not conducted on the few commercial vessels which BIW

employees are the crew. Although the BIW employees actually man and operate the vessel during all phases of a trial, they do so strictly in accordance with the trial agenda, which sets out fully and precisely all manuevers to be undertaken. The owner's representative and his staff must approve all agendas; are present during the trials; and have authority to modify a trial while in progress or to terminate the trial and order a return to port.[22]

Upon completion of the new construction or overhaul, the vessel is delivered to the owner at the BIW

(footnote continued from previous page) overhauled from 1950 to the present time. Most of BIW's commercial work involved new construction. See Deposition of William F. Mussenden, ¶ 2.

[22]Affidavit of William Rich, ¶¶ 24-26; Affidavit of Edward Atkinson, ¶¶ 3-6.

shipyard. BIW does not hold legal title to any newly constructed or overhauled commercial vessel at any time.[23]

II.

The Law

Under Section 905(b) of the LHWCA, an employee may sue a "vessel" for its negligence.[24] The term "vessel" is defined by Section 902(21) of the Act to include "said vessel's owner, owner pro

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[23]Affidavit of William F. Mussenden, ¶¶ 4,5.

[24]Section 905(b) aprovies in relevant part as follows:

(b) In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such a vessel as a third party in accordance with the provisions of section 933 of this titled, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void.

33 U.S.C. § 905(b) (emphasis added).

hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member." 33 U.S.C. §902(21) (emphasis added).[25] R-M contends that BIW, although concededly not the owner of vessels undergoing construction or repair in it's shipyard, is the owner pro hac vice of such vessels; is a vessel as defined by Section 902(21); and therefore, in its capactity as a vessel, is subject to liability to its employees for negligence under Section 905(b). See, e.g., Reed v. Yaka, 373 U.S. 410

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[25]Section 902(21) reads as follows:

> (21) The term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this chapter suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. §902(21) (emphasis added).

(1963); Griffith v. Wheeling Pittsburg Steel Corp., 521 F.2d 31 (3rd Cir. 1975), cert. denied, 423 U.S. 1054 (1976). There is no question that as a compensation-paying employer, BIW is immune, by reason of Section 905(a) of the LHWCA, from third-party claims for contribution, at least to the extent that, as an employer, it is immune from common law liability to its employees. Halcyon Lines v. Haenn Ship Ceiling and Refitting Corp., 342 U.S. 282, 285-86 (1952); Austin v. Johns-Manville Sales Corp., supra, 508 F. Supp. at 315. Thus, the parties agree that BIW may be found liable for contribution to R-M only if BIW, as a "vessel," could be found liable to the plaintiff employees. See Griffith v. Wheeling Pittsburgh Steel Corp., supra, 521 F.2d at 44.

Although the LHWCA does not define "owner pro hac vice," the governing legal principles are well settled. An owner pro hac vice is one who assumes by charter or otherwise "exclusive possession, control, command and naviagation" of a vessel for a specific period of time. Stephenson v. Star-Kist Caribe, Inc., 598 F.2d 676, 679 (1st Cir. 1979); Guzman v. Pichirilo, 369 U.S. 698, 699, 700 (1962); G. Gilmore and C. Black, Jr., The Law of Admiralty, 239-43 (2d ed. 1975). An owner pro hac vice "has complete--though perhaps only temporary--dominion over the vessel entrusted to him. He commands her navigation and is entitled to avail himself fully of her services." Olsen v. Todd Shipyards Corp., 435 F. Supp. 568, 571 (W.D. Wash. 1977). "It is therefore

tantamount to, though just short of, an outright transfer of ownership." Guzman v. Pichirilo, supra, 369 U.S. at 700.

It is clear on the instant record that BIW did not assume the kind of exclusive control over vessels being constructed or repaired in its yard to have made it the pro hac vice owner thereof. BIW's dominion over these vessels are confined to the narrow sphere of carrying out its obligations under its construction or repair contracts. Control of the vessel clearly remained with the United States Navy or the private shipowner. BIW could not, for example, use a vessel for its own commercial ventures or for any other purpose normally within the prerogative of an owner. Compare Olsen v. Todd Shipyards Corp., supra, 521 F.2d 31 and

Blair v. United States Steel Corp., 444 F.2d 1390 (3rd Cir. 1971) (per curiam), cert. denied, 404 U.S. 1018 (1972). BIW's control over the vessels was tightly circumscribed by the contracts and was subject to the owner's ultimate authority. BIW could not move vessels within the yard without first obtaining approval from either the United States Navy Supervisor or the private owner's representative. Although BIW crews manned the vessels during the dock, sea and acceptance trials, operation of the vessels during these trials was mandated by contract and was strictly in accordance with agendas approved by the Supervisor of the owner's representative. In short, the full-time presence of the Navy Supervisor or private owner's representative; and the authority of the

Supervisor or owner's representative; the constant inspection and supervision of the work by the Supervisor or owner's representative; and the authority of the Supervisor owner's representative to order changes in the work or to stop work entirely plainly establish that BIW did not have the type of exclusive "control" over these vessels which is required for pro hac vice ownership. Accord, Bossard v. Port Allen Marine Service, Inc., 624 F.2d 673, 674 (5th Cir. 1980) (per curiam); Rao v. Hillman Barge & Construction Co., 467 F.2d 1276, 1277 (3rd Cir. 1972) (per curiam); Bailey v. Johns-Manville Sales Corp., Civ. No. 76-155-NN, slip op. at 5 (E.D. Va. Feb. 12, 1982); Olsen v. Todd Shipyards Corp., supra, 435 F. Supp. at 571-72, 572 n.15. But see Simko v. C & C Marine Maintenance

Co., 484 F. Supp. 401, 403-04 (W.D. Pa.), aff'd, 639 F.2d 772, 775 (3rd Cir. 1980).

The Court holds that BIW was not the owner pro hac vice of vessels being constructed or repaired in its yard during the periods of time these plaintiffs were employed by BIW; that BIW was not a "vessel" within the meaning of Section 902(21) of the LHWCA; and that therefore BIW is not subject to liability to R-M for contribution and indemnity under Section 905(b) of the Act.

III.

ORDER

The Court being persudaded that the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, show that there is no genuine issue as to any material fact and that BIW is entitled to

a judgment as a matter of law, Fed. R. Civ. P. 56(c), BIW's motion for summary judgment dismissing R-M's third-part complaints in the above-entitled actions is granted and the Clerk of this Court is directed to enter judgment forthwith dismissing said third-party complaints with prejudice.

Dated at Portland, Maine this 9th day of August 1982.

United States District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

In re ALL MAINE ASBESTOS LITIGATION)

(BIW Cases))

MEMORANDUM OF OPINION AND ORDER OF THE COURT

GIGNOUX, Senior District Judge

Presently pending in this Court are approximately fifty actions which have been brought by present and former employees, and the representatives of deceased employees, of Bath Iron Works (BIW), a private shipyard in Bath, Maine, against various manufacturers and suppliers of asbestos-containing products. Plaintiffs seek recovery of compensatory and punitive damages for

injuries the employees allegedly sustained from exposure to defendants' products during the course of their employment at BIW. The complaints assert causes of action based on negligence, strict liability, and breach of express and implied warranties. Jurisdiction is predicated upon diversity of citizenship. 28 U.S.C. §1332(a); Austin v. Unarco Industries, Inc., 705 F.2d 1,3 (1st Cir.), cert. dismissed, 104 S. Ct. 34 (1983).

In addition to denying any liability to the plaintiffs, certain defendants have filed third-party actions against BIW seeking contribution and indemnity. With the Court's approval, a model third-party complaint has been filed in each plaintiff's action. The model third-party complaint contains six

counts. In the first four counts, defendants allege that BIW "willfully, wantonly, recklessly and negligently" failed to exercise due care in the discharge of its duty to protect the health and safety of its employees by failing to warn them of the dangers from exposure to asbestos products and by failing to protect them from its dangers. In Count I, defendants seek pro tanto relief, asserting that they are entitled to have any judgment for compensatory damages recovered against them by a plaintiff reduced by the amount of BIW's worker's compensation lien, or, alternatively, that they are entitled to a judgment against BIW in the amount of that lien. Count II seeks contribution or indemnity by BIW for any punitive damages recovered by a plaintiff against

defendants. Count III seeks indemnity by BIW to the extent of any judgment recovered by a plaintiff against defendants for loss of consortium or consequential or punitive damages. In Count V, defendants allege that BIW's medical care of its employees was negligent and seek contribution and indemnity by BIW on that basis. In Count VI, defendants seek contribution and indemnity by BIW as the owner pro hac vice of the vessels in its shipyard on which the employees worked.

This is the "third round" of an ongoing dispute between defendants and BIW concerning BIW's third-party liability for its employees' asbestos-related injuries. In the "first round," the Court granted BIW's motion for summary judgment and dimissed defendants'

third-party claims as barred by the excluive liability provision of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 905(a). Austin v. Johns-Manville Sales Corp., 508 F. Supp. 313 (D. Me. 1981).[1] The "second round" was precipitated by the subsequent holding of the United States Supreme Court in Lockheed Aircraft Corp. v. United States, U.S. ,103 S. Ct. 1033, 51 U.S.L.W. 4206 (U.S. Feb. 23, 1983), that the exclusive liability provision of the Federal Employees Compensation Act (FECA), 5 U.S.C. §8116(c), does not bar an indemnity action by an unrelated third party against the United States. Being

[1]It is undisputed that the BIW employees and deceased employees in these cases were covered by the LHWCA, 33 U.S.C. §901 et seq.

persuaded that the analysis in Austin was inconsistent with the teaching of Lockheed, this Court granted a motion for reconsideration of its Austin ruling, vacated its prior order, and denied BIW's motion for summary judgment. All Maine Asbestos Litigation (BIW Cases), Bench Ruling (D. Me. Mar. 9, 1984).[2] At the same time, the Court reserved ruling on BIW's newly-raised defense that it was protected from third-party claims against it as barred by section 4 of the Maine Act. The record before the Court consists of the pleadings and three affidavits filed by BIW in support of its motion. The issues have been comprehensively briefed and argued.

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[2]A copy of the Court's March 9, 1984 Bench Ruling is attached as Appendix A.

For the reasons to be stated, the Court has concluded that so much of BIW's motion as seeks dismissal of defendants' claims for contribution and indemnity must be granted, but that so much of the motion as seeks dismissal of the claims for pro tanto relief must be denied.

I.

The Court must begin its analysis with the Supreme Court's Lockheed opinion. In Lockheed, the Court held only that "FECA's exclusive liability provision, 5 U.S.C. §8116(c), does not directly bar a third-party indemnity action against the United States." U.S. , 103 S. Ct. at , 51 U.S.L.W. at 4208. Relying on its review of the legislative history, it found that "(t)here is no evidence whatever that Congress was concerned with the rights of

unrelated third parties,'" and concluded that section 8116(c) "had been intended to govern only the relationship 'between the Government on the one hand and its employees and their representatives or dependents on the other.'" Id. at , 103 S. Ct. at , 51 U.S.L.W. at 4207 (quoting Weyerhauser S.S. Co. v. United States, 372 U.S. 597 1601 (1963)). Thus, contrary to defendants' contention, Lockheed did not affirmatively confer upon Lockheed a substantive indemnity claim against the United States. Indeed, the Court expressly stated that the validity of Lockheed's underlying claim for indemnity was not before it. Id. at , 103 S. Ct. at , 51 U.S.L.W. at 4208 n.8. Rather, to determine that question, the Court made clear that

recourse must be had to the "governing substantive law." Id. at , 51 U.S.L.W. at 4208.

In its March 9, 1984 ruling, this Court held that the Lockheed interpretation of FECA's exclusive liability provision applied with equal force to the "nearly identical" LHWCA provision, 33 U.S.C. §905(a)). See Lockheed, U.S. at , 103 S. Ct. at ,51 U.S.L.W. at 4207. This Court also concluded that "there is no evidence either in the language of the statute or in the congressional history that Congress addressed itself to, or was in any way concerned with, the rights of non-vessel owner third parties." All Maine Asbestos Litigation (BIW Cases), Bench Ruling, see infra Appendix A to Decision of July 5, 1984 at A-61. It

follows that, as in Lockheed, it is to the governing substantive law that the Court must look to determine the availability to defendants of a third-party claim for indemnity or contribution[3] against BIW. Since jurisdiction of these cases is based upon diversity of citizenship, Austin v. Unarco Industries, Inc., 705 F.2d at 3, the governing substantive law is that which a Maine court would apply. Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

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[3]Although in Lockheed the Supreme Court was concerned only with a third-party indemnity claim, it is clear that the holding is equally applicable to a third-party contribution claim. See Johns-Manville Sales Corp. v. United States, No. C-81-4561, slip op. at 10 (N.D. Cal. Jan. 6, 1984), reprinted in Asbestos Litigation Reporter 7, 721, 7, 724 (Jan. 20, 1984); see also Prather v. The Upjohn Co., MCA No. 81-0211, slip op. at 3 (N.D. Fla. Feb. 15, 1984).

II.

It is undisputed that BIW is a compensation-paying employer covered by the Maine Act, 39 Me. Rev. Stat. Ann. §1 et seq (1978 & Supp. 1983-84). Section 4 of the Maine Act provides that employers who provide workers' compensation "shall be exempt from civil actions because of such injuries either at common law or under sections 141 to 148, under Title 14, sections 8101 to 8118 or under Title 18-A, section 2-804." 30 Me. Rev. State. Ann. §4 (Supp. 1983-84).[4] The Supreme Judicial Court of Maine has held unequivocally that the employer's immunity granted by this section "extends to all non-contractual rights of

[4]The statutes referred to relate to employers' liability in the absence of workers' compensation, actions under the Maine Tort Claims Act, and actions for wrongful death.

contribution and indemnity." McKellar v. Clark Equipment Co., 472 A.2d 411, 416 (Me. 1984); Roberts v. American Chain & Cable Co., 259 A.2d 43, 51 (Me. 1969). Thus, section 4 of the Maine Act, as interpreted by the Maine Court, provides BIW with immunity from third-party claims for contribution or indemnity arising from work-related injuries to its employees.

III.

Defendants advance two grounds in support of their argument that Section 4 of the Maine Act cannot be applied in these cases to immunize BIW from liability on their third-party claims. First, they contend that the federally-enacted LHWCA has preempted section 4 of the Maine Act. Second, they argue that where plaintiffs have elected to receive

compensation under the LHWCA, rather than under the Maine Act, section 4 of the Maine Act does not apply.[5] The Court finds no merit in either argument.

A. Preemption

In Sun Ship, Inc. v. Pennsylvania, 447 U.S. 715, 719, 722 (1980), the Supreme Court clearly enunciated the three jurisdictional spheres within which marine-related injuries fall. At the seaward extreme, nonlocal maritime injuries fall under the LHWCA, and Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917), places a constitutional bar on States applying their compensation laws. Sun Ship, 447 U.S. at 719; see e.g., Anderson v. Alaska Packers

[5]The affidavits submitted by BIW in support of its motion disclose that the vast majority of plaintiffs have chosen to receive compensation under the LHWCA.

Association, 635 P.2d 1182, 1184-85 (Alaska 1981). At the other extreme, beyond the landward extension of the LHWCA, see 33 U.S.C. §903(a), state compensation laws alone control. Sun Ship, 447 U.S. at 719. In the "twilight zone" between the Jensen line and the inland limit of the landward extension of the LHWCA "maritime but local" injuries can be compensated under either state or federal law, id., and "federal jurisdiction . . . coexist(s) with state compensation laws." Id. at 722; see Calbeck v. Travelers Insurance Co., 370 U.S. 114, 128-29 (1962); Davis v. Department of Labor, 317 U.S. 249, 256 (1942). Concurrent federal and state jurisdiction in the "twilight zone" is now too well established to be disputed. Director v. Perini North River

Associates, U.S. , , S. Ct. , , 51 U.S.L.W. 4074, 4080-81 (U.S. Jan. 11, 1983); Landry v. Carlson Mooring Service, 643 F.2d 1080, 1087-88 (5th Cir.), cert. denied 454 U.S. 1123 (1981); Newport News Shipbuilding & Drydock Co. v. Director, 583 F.2d 1273, 1276-78 (4th Cir. 1978), cert. denied, 440 U.S. 915 (1979); Thompson v. Teledynbe Movable Offshore, Inc., 419 So.2d 822, 826 (La. Sup. Ct. 1982); American Original Foods, Inc. v. Ford, 272 S.E.2d 187, 188-90 (Va. Sup. Ct. 1980); Ward v. State Workmen's Compensation Commissioner, 301 S.E. 2d 592, 594 (W.Va. Sup. Ct. App. 1983); see Murray v. City of Augusta, 394 A.2d 1171, 1173 (Me. 1978); 4 A. Larson, The Law of Workmen's Compensation §§ 89.70-89.73 (1983).

Within the "twilight zone" of concurrent jurisdiction, the LHWCA "supplements, rather than supplants, state compensation law." Sun Ship, 447 U.S. at 720; see 1A e. Jhirad, Benedict on Admiralty § 23a at 2-18.2-2.19 (7th ed. 1983). The LHWCA would only preempt a conflicting provision of a state compensation act. See Sun Ship, 447 U.S.at 724 n.6; Murphy v. Woods Hole, Martha's Vineyard & Nantucket S.S. Authority, 545 F.2d 235, 241 (1st Cir. 1976); see also Askew v. American Waterways Operators, Inc., 411 U.S. 325, 341 (1973). Preemption will not be presumed absent a clear conflict between federal and state legislation "in a field which the states have traditionally occupied." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); see

Askew v. ASmerican Waterways Operators, Inc., 411 U.S. at 341; Murray v. City of Augusta, 394 A.2d at 1173; 4 A. Larson, The Law of Workmen's Compensation §89.71 at 16-286.45 (1983).

Defendants can point to no presently relevant provision of the LHWCA which conflicts with Section 4 of the Maine Act. They suggest that section 905(a) may create such a conflict. But, as previously observed, see ante at 5, Congress, in enacting section 905(a) of the LHWCA, left undisturbed existing law regarding the rights of unrelated third parties against covered employers. Moreover, since the outcome of the third-party litigation does not directly affect any award to the employee, the Court cannot see any conflict between the immunity provision of the Maine Act and

Congress' policy objective of providing adequate benefits to maritime workers. See Sun Ship, 447 U.S. at 723.[6]

B. Election

It is undisputed that, with only a few exceptions, plaintiffs have chosen to receive workers' compensation benefits under the LHWCA, rather than under the Maine Act. Defendants argue that

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[6]The only provision of the LHWCA arguably in conflict with section 4 of the Maine Act is section 905(b), 33 U.S.C. §905(b), which permits a covered employee to recover damages for injuries caused by the negligence of a vessel owned by his employer. See Jones & Laughlin Steel Corp. v. Pfeiffer, U.S. , 103 S. Ct. 2541, 51 U.S.L.W. 4795 (U.S. June 15, 1983); In re All Maine Asbestos Litigation, 581 F.Supp. 963, 975-77 (D. Me. 1984). Plaintiffs in these actions, however, can have no such claim against BIW because, as the Court has previously held, BIW was neither the owner nor the owner pro hac vice, see 33 U.S.C. §902(21), of the vessels upon which the employees worked. See Bernier v. Johns-Manville Sales Corp., Civ. No. 78-98 P (D. Me. Aug. 9, 1982).

plaintiffs' acceptance of LHWCA benefits constitutes an election of the remedy under federal law, precluding the application of state law in these cases. They cite Professor Larson's discussion of conflicts between state workers' compensation acts. See 4 A. Larson The Law of Workmen's Compensation §88. The short answer to this contention is that "(e)lection of remedies involves a choice between inconsistent remedies," whereas "(s)tate and Longshore benefits are not inconsistent but complementary." Id. §89.74 at 16-286.50-.51 (emphasis in original). The courts have thus overwhelmingly rejected the election of remedies argument as between LHWCA and a state workers' compensation act. Calbeck v. Travelers Insurance Co., 370 U.S. at 131-32; Simpson v. Director, 681 F.2d 81,

91 (1st Cir. 1982), cert. denied, 103 S. Ct. 762 (1983); Landry v. Carlson Mooring Service, 643 F.2d at 1087-88; Newport News Shipbuilding & Drydock Co. v. Director, 583 F.2d at 1276-77; Murray v. City of Augusta, 394 A.2d at 1173. But see Poche v. Avondale, Inc., 339 S.E.2d 1212, 1221 (La. 1976).[7] In sum, as

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[7] Professor Larson suggests that Poche was decided as it was because Louisiana is a civil law state and the election doctrine has its roots in Roman Law. See 4 A. Larson, The Law of Workmen's Compensation §89.74 at 16-286.51.

Defendants argue that the Supreme Court recognized an election of remedies in Hahn v. Ross Island Sand & Gravel Co. 358 U.S. 272 (1959) (per curiam). Hahn was based upon a clause in section 903(a) of the LHWCA which provided that the LHWCA did not apply "if recovery . . .through workmen's compensation proceedings may. . .validly be provided by State law." See Hahn, 358 U.S. at 272. The meaning of that language was substantially narrowed as the Supreme Court developed the doctrine of concurrent jurisdiction. See, e.g., Calbeck v. Travelers Insurance Co., 370 U.S. 114 (1962). In any event, Congress eliminated the language upon which Hahn

Professor Larson has observed, "the doctrine of election of remedies is completely out of place as between state and Longshore remedies." 4A. Larson, The Law of Workmen's Compensation §89.74 at 16-286.50.

IV.

There remains for consideration only the prayer for pro tanto relief in Count I of defendants' third-party complaint. The question of whether section 4 of the Maine Act immunizes a compensation-paying employer from pro tanto claims presents a question of Maine law on which the Supreme Judicial court of Maine has not spoken. Moreover, the justices of the Maine Superior Court, courts in other

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(footnote continued from previous page) was based when it amended the LHWCA in 1972. Pub. L. 92-576, § 2(c), 86 Stat. 1251 (Oct. 27, 1972).

jurisdictions construing similar compensation statutes, and the commentators are split on this issue. Compare Burnell v. West Oxford Agricultural Society, Docket No. CV 81-151 (Oxford, June 28, 1983) (Bradford, J.) (permitting pro tanto recovery); Associated Construction & Engineering Co. v. Workers' Compensation Appeals Board, 587 P.2d 684, 150 Cal. Rptr. 888 (Cal. 1978) (Mosk, J.) (permitting pro tanto recovery in California); Witt v. Jackson, 17 Cal. Rptr. 369, 366 P.2d 641 (1961) (Traynor J.) (permitting pro tanto recovery in California); Note, Exceptions to the Exclusive Remedy Requirements of Workers' Compensation Statutes, 96 Harv. L. Rev. 1641 1660-61 (1983) (arguing for pro tanto recovery in California).Note, New Policies Bearing on the Negligent

Employer's Immunity from Loss-Sharing, 29 Me. L. Rev. 243 (1978) (arguing for pro tanto relief), with Wacome v. Blue Rock Industries, Docket No. CV-82-270 (Kennebec, Mar. 16, 1983) (McCarthy, J.) (denying pro tanto recovery); Shorey v. Boulter & Son, Inc., Docket No. 77-475 (Penobscot, May 3, 1979) (Brown, J.) (denying pro tanto recovery); Schweizer v. Elox Division of Colt Industries, 70 N.J. 280, 359 A.2d 857 (1976) (holding courts in New Jersey do not have the authority to grant pro tanto recovery); 2A A. Larson, The Law of Workmen's Compensation §§ 76.20 et seq. (1982) (arguing aginst pro tanto relief); see also Kimball v. Lyons Machine Works, Civ. No. 75-119 SD (D. Me. July 22, 1976)(allowing a pro tanto claim to survive a motion to dismiss).

The issue presented here raises a question of Maine law as to which there is no clear controlling precedent in the decisions of the Supreme Judicial Court. In these circumstances, especially in view of the division among the Maine Superior Court justices and authorities elsewhere, the prudent course for this Court to follow is to deny BIW's motion for summary judgment insofar as it seeks dismissal of the claims for pro tanto relief, and, upon its own motion or upon request of a party at the close of trial, to consider certifying the question to the Supreme Judicial Court of Maine pursuant to Me. R. Civ. P. 76B. Such certification should be made only on a complete record. See Hiram Ricker & Sons v. Students International Meditation

Society, 342 A.2d 262 (Me. 1975); White v. Edgar, 320 A.2d 668 (Me. 1974); In re Richards, 223 A.2d 827 (Me. 1966).

V.

In accordance with the foregoing, it is ORDERED as follows:

(1) So much of BIW's motion for summary judgment as seeks dismissal of the claims for contribution and indemnity in defendants' Model Third-Party Complaint is GRANTED;

(2) So much of BIW's motion for summary judgment as seeks dismissal of the claims for pro tanto relief in defendants' Model Third-Party Complaint is DENIED.

Dated at Portland, Maine this 5th day of July 1984.

U.S. District Judge

APPENDIX A TO DECISION OF JULY 5, 1984

The motion before the Court is the motion filed by Raymark Industries, Incorporated, On September 13, 1983, requesting that this Court reconsider its decision and order in the case of Austin v. Johns-Manville Sales Corporation, 508 F. Supp. 313 (D. Me. 1981). In that case this Court ruled, on the basis of then authoritative Supreme Court cases, that the third-party claims for contribution and/or indemnity asserted by the defendant Armstrong Cork against Bath Iron Works were barred by the exclusive liability provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §905(a). The Court therefore granted BIW's motion for a summary judgment dismissing the amended third-party complaint of Armstrong Cork.

Subsequently, the Court entered similar orders, without further argument, in three other asbestos actions, the so-called Bernier, Moore and Jones cases, Civil Nos. 78-98, 79-55 and 81-00145 (Consolidated) and Civil No. 79-73, granting BIW's motions for summary judgment dismissing third-party complaints filed against BIW by defendant Raybestos-Manhattan (now Raymark Industries, Incorporated). The Raymark motion presently before the Court seeks reconsideration of all these and any similar rulings by this Court.

The basis of the motion for reconsideration is the subsequent opinion of the United States Supreme Court in Lockheed Aircraft Corp. v. United States, decided February 23, 1983. In Lockheed, the Supreme Court held that the exclusive

liability provision of the Federal Employees' Compensation Act, 5 U.S.C. §8116(c), did not bar a third-party indemnity action by an unrelated third party against the United States. Having thoroughly analyzed the Supreme Court's opinion in Lockheed, the briefs submitted by counsel on the present motion, and the earlier Supreme Court cases referred to in those briefs, this Court is persuaded that the rationale of the Supreme Court in Lockheed compels the conclusion that this Court's ruling in Austin cannot survive.

The language of the exclusivity provision of the LHWCA, Section 905(a), is in all material respects identical to the language of the exclusive liability provision of the FECA, §8116(c). In Lockheed, the Supreme Court construed

this language as not barring third-party indemnity actions against the United States, the employer covered by the FECA, by unrelated third parties. The basis of the Supreme Court's decision in Lockheed was both the language of § 8116(c) and the legislative history of the FECA. As to the latter, the Supreme Court concluded that there is no evidence that Congress was concerned with the rights of unrelated third parties. In this connection, the Court pointed out that § 8116(c) was intended to govern only the rights of employees, their relatives, and persons claiming through or on behalf of them, these being the only parties who benefit from the "quid pro quo" compromise of the FECA.

Applying the Supreme Court's analysis in Lockheed to § 905(a) of the LHWCA, the language of § 905(a) is in all material respects identical to the language of § 8116(c), and the Supreme Court's construction of that language in FECA would appear to be equally applicable to the corresponding LHWCA language. Moreover, a review of the legislative history of the LHWCA, including the 1972 amendments, persudades this Court that it is equally unpersuasive to establish that Congress was concerned with the rights of unrelated non-vessel owner third parties. Insofar as unrelated non-vessel owner third parties are concerned, the 1972 amendments involved no "quid pro quo" compromise similar to that which benefited vessel owners. In short, there

is no evidence either in the language of the statute or in the congressional history that Congress addressed itself to, or was in any way concerned with, the rights of non-vessel owner third parties.

The Court has concluded that Lockheed's analysis of the exclusivity provision of the FECA is equally applicable to the exclusivity provision of the LHWCA. It follows that the ruling of this Court in Austin is inconsistent with Lockheed and cannot stand.

Raymark's motion for reconsideration of the Austin ruling is granted. The order granting BIW's motion for summary judgment dismissing the third party complaint of Armstrong Cork in that case, and the further orders of this Court granting BIW's motion for summary judgment dismissing the third party

complaints of Raybestos-Manhattan in three other cases, are vacated. The Court will enter an order denying BIW's motions for summary judgment.

The denial of these motions is without prejudice to the right of BIW to file an appropriate motion based on its newly-raised defense that the substantive law which this Court must apply, quite apart from Section 905(a), bars the third party claims for contribution and indemnity asserted against BIW in these cases.

SUPREME COURT OF THE UNITED STATES

RAYMARK INDUSTRIES, INC.
85–1246 *v.*
BATH IRON WORKS CORPORATION ET AL.

EAGLE-PICHER INDUSTRIES, INC.
85–1253 *v.*
UNITED STATES

RAYMARK INDUSTRIES, INC., ET AL.
85–1288 *v.*
UNITED STATES

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Nos. 85–1246, 85–1253 AND 85–1288. Decided May 19, 1986

The petitions for writs of certiorari are denied.

JUSTICE WHITE, dissenting.

In No. 85–1246, petitioner, an asbestos manufacturer, is the defendant in a products liability suit brought by the widow of a deceased employee of respondent's shipyard. Petitioner sought contribution from respondent on various theories, including a claim under § 905(b) of the Longshore and Harbor Workers' Compensation Act, 33 U. S. C. § 905(b). The United States Court of Appeals for the First Circuit held that § 905(b) covers only those torts that are within the reach of admiralty jurisdiction as defined in *Executive Jet Aviation Co.* v. *United States*, 409 U. S. 249 (1972). *Drake* v. *Raymark Industries*, 772 F. 2d 1007 (1985). The First Circuit concluded that ship construction does not satisfy the "maritime nexus" test of *Executive Jet*. As the First Circuit realized, its interpretation of the scope of § 905(b) conflicts with the decision in *Hall* v. *Hvide Hull No. 3*, 746 F. 2d 294 (CA5 1984), which holds that employees covered by the LHWCA who sue under § 905(b) need not satisfy the "mari-

time nexus" test of *Executive Jet* so long as the underlying event took place on a ship on navigable water.

In Nos. 85–1253 and 85–1288, which involve third-party claims by asbestos manufacturers against the United States as vessel owner and shipyard employer, the First Circuit followed its holding in *Drake*, *supra*, regarding the scope of § 905(b). *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F. 2d 1023 (1985).

I would grant certiorari to resolve the conflict presented in these cases.